Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

LAURENCE K. LIBBERTON,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

APPENDICES A-D TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals,
Ninth Circuit.
Laurence K. **LIBBERTON**, Petitioner-Appellant,
v.
Charles L. **RYAN**, interim Director of the Arizona Department of Corrections, Respondent-Appellee.
No. 07-99024.

Argued and Submitted June 3, 2009.
Filed Oct. 2, 2009.

Background: After defendant's convictions of murder, robbery, theft, and kidnapping were affirmed, 141 Ariz. 132, 685 P.2d 1284, he petitioned for writ of habeas corpus. The United States District Court for the District of Arizona, Earl H. Carroll, J., 2007 WL 2746649, denied the petition and denied defendant's motion to alter or amend the judgment, 2007 WL 3101841. Defendant appealed.

Holdings: The Court of Appeals, William A. Fletcher, Circuit Judge, held that:
(1) Antiterrorism and Effective Death Penalty Act (AEDPA) was applicable to habeas petition;
(2) even if witness who testified against defendant entered into an undisclosed deal with prosecutors before being interviewed by prosecutor, state's failure to disclose any such agreement was not material, as required to establish a violation of due process under *Brady*;
(3) prosecutor's failure to correct witness's testimony that he had not received any such deal was not

material, as required to establish violation under *Napue v. Illinois*, which held that conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment; but
(4) defendant was denied effective assistance of counsel at sentencing.

Jose A. Cardenas, Lewis & Roca, Phoenix, AZ, Denise Irene Young, Tucson, AZ, for the petitioner-appellant.

Robert J. Gorman, Jr., Kent E. Cattani, Office of the Arizona Attorney General, Tucson, AZ, for the respondent-appellee.

Appeal from the United States District Court for the District of Arizona, Earl H. Carroll, District Judge, Presiding. D.C. No. CV-97-01881-EHC.

Before W. FLETCHER, RICHARD R. CLIFTON and MILAN D. SMITH, JR., Circuit Judges.

William A. FLETCHER, Circuit Judge:

Laurence Libberton, Steven James, and Martin Norton were convicted in separate proceedings in Arizona state court for crimes connected to the murder of Juan Maya. The prosecution theory at trial was that Libberton, along with James and Norton, severely beat Maya, drove him to an isolated area, killed him, and threw his body down a mine shaft. The prosecution contended that Libberton and James were essentially equal participants in the murder. The prosecution contended that Libberton, who had recently walked

away from a work furlough program, participated in the killing because he wanted to use Maya's car to flee the jurisdiction. The jury returned a verdict of guilty for first degree murder, robbery, theft, and kidnapping. The judge sentenced Libberton to death.

James was convicted of first degree murder and sentenced to death in a separate trial. Norton, a minor, pleaded guilty in juvenile court to participating in the murder and was sentenced to three years in prison. In accordance with his plea agreement, Norton testified at Libberton's trial. Norton described Libberton as a central and willing participant in Maya's murder.

The federal district court denied Libberton's petition for a writ of habeas corpus. Libberton appeals five holdings by the district court. Two of those holdings were not certified as appealable issues by the district court, but we certified them before holding oral argument.

One of Libberton's arguments concerns whether his current federal petition for habeas corpus is governed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Because our holding on this issue affects our holdings on the others, we address it first.

The four remaining issues are as follows. First, Libberton claims that Norton entered into a deal with prosecutors that affected his testimony at trial. Libberton contends that the state failed to disclose this deal, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104

(1972). Second, Libberton claims that prosecutors failed to correct Norton's false testimony that he had not been given the aforementioned deal, in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Third, Libberton claims that the state courts applied an unconstitutional sentencing factor, in violation of *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). Fourth, Libberton claims that his counsel was unconstitutionally ineffective in connection with his sentencing, in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

For the reasons that follow, we hold that AEDPA governs Libberton's habeas petition. We affirm the district court's denial of habeas on Libberton's first three claims, as numbered above. We reverse on his fourth claim. The result is that we deny Libberton's petition for a writ of habeas corpus with respect to the guilt phase of his trial, but grant with respect to the sentencing phase.

I. Background

A. The Investigation

On November 18, 1981, Laurence Libberton, Martin Norton, Steven James, and Daniel McIntosh were taken into custody on suspicion of forgery. Libberton had used identification belonging to Juan Maya while attempting to cash a check at a bank. He was apprehended as he was leaving the bank. The others were apprehended while waiting outside in Maya's car. Libberton was booked into county jail on suspicion of

forgery. Norton, James, and McIntosh were released. After Maya's father informed police that his son was missing, police located and interviewed Norton and James.

During his first interview with police investigators, Norton told police Detective Russell Davis different versions of what had happened on the night of November 16, two days earlier. Norton initially said that he had been hitchhiking that evening and had been picked up by Maya. He reported that he had gotten into Maya's car, and Maya had made "sexual advances at him by trying to kiss him and put his hands in his pants." Norton claimed that he responded by punching Maya, getting out of the car, and fleeing. Norton went to Steven James's trailer where he had been living, but Maya followed him in the car. According to this version of his story, Norton was able to evade Maya before reaching the trailer. Norton said that he never saw Maya again.

However, as the interview continued, Norton changed his story. Norton now said that Maya came to James's trailer, and that he saw James and Libberton beat Maya. In this version of his story, Norton claimed that after severely beating Maya, James and Libberton put Maya in the back seat of his own car. James and Libberton then drove away with Maya in the car, telling Norton that they would be back "in a little while" and that he should clean up the trailer while they were gone. When Libberton and James returned hours later, they told Norton "not to tell a soul about this, or [Norton] would die the same way [Maya] did."

Police then interviewed James. James said that Norton came running up to the door of James's trailer on the evening of November 16 and told James that someone, who turned out to be Maya, was "following him and was trying to rape him." James said that he and Norton left the trailer in search of Maya. They saw him "running down the drive further into the park." They chased him, caught him, and brought him back to the trailer. James said that Norton slapped Maya, and tried to get him to reveal "where his money was at." James said that Norton and Libberton then took Maya out to his car and put him inside. At that point in the interview, James requested a lawyer.

Shortly thereafter, James voluntarily offered to show investigators Maya's body. Police drove with James to his parents' property southwest of Salome, Arizona. James directed police to a mine shaft on the property in which they could see Maya's body.

Norton was interviewed again on November 26, this time by Detective Jack Hackworth. Norton had now been charged with forgery and murder. Norton once again stated that he was hitchhiking on the evening of November 16 and that Maya picked him up. Norton said that Maya's car had electric locks and that Maya locked the doors once Norton was inside the car. He said that "he became frightened" after Maya made sexual advances toward him, and that he told Maya that if he went with him to a friend's trailer, Norton "had a friend that was also queer there and they could make out." Norton said that Maya agreed. After reaching the trailer, however, Norton said that he told James and Libberton that Maya was "a queer," and

that James and Libberton assaulted him, making him bleed profusely. James took Maya's wallet and threw it to Norton. James pulled out a rusty pistol and pointed it at Maya, and James and Libberton then dragged Maya outside to his car. In this version of his story, Norton said that he got into the car with the others. Norton said that James drove while Libberton sat in the back seat pointing a gun at Maya.

Norton said that during the drive, James stopped at a gas station where he purchased a carton of cigarettes and filled Maya's car with gas. James used Maya's credit card and forged Maya's name on the receipt. James said during the ride that they were going to shoot Maya and throw him down a mine. According to Norton, Maya could hear what Libberton and James were saying. Norton said that he pleaded with the other two men not to kill Maya, but that Libberton responded: "No, if we don't kill him, he will snitch us off."

Norton said that once they reached the mine, James pointed the gun at Maya and walked him up to the opening to the mine shaft. James then shot Maya in the left forearm and handed the gun to Norton. Norton said that he then passed the gun on to Libberton, who shot Maya in the head. Maya appeared to be breathing, so James shot him again. He still appeared to be alive, so James hit him with a large rock. Libberton did the same. Both James and Libberton then told Norton to hit Maya with a rock. Norton said that he threw a rock toward Maya, but missed. James then said, "You either help kill him or we'll kill you." Norton said that he then hit Maya in the back with a rock.

Norton said that James and Libberton dragged Maya by his belt up to the mine shaft and threw him in. The three men then returned to Maya's car and drove back to Phoenix. Norton said, "It was pretty quiet [in the car]. Nobody said much other than both [Libberton] and [James] told me if I told anyone, I would be in the shaft with him."

After Norton gave this statement, the Juvenile Division of the Maricopa County Superior Court appointed attorney Robert A. Wertsching to represent him. Norton was fourteen years old at the time of the crime. During Libberton's state post-conviction proceedings in 1994, Libberton submitted an affidavit signed by Wertsching in which Wertsching stated that soon after his appointment he had at least two conversations with the head prosecutor of the juvenile division, during which they discussed whether the County Attorney would agree to try Norton as a minor rather than as an adult. According to Wertsching, the prosecutor indicated orally that "if Mr. Norton would give a full and accurate statement to the County Attorney and would testify consistently with that statement at the trials of the adults who participated in the homicide offense, the County Attorney would not seek to have[Norton] transferred to adult court." Norton subsequently met with Myrna Parker, a Deputy County Attorney, who conducted her own interview of Norton. Parker was later the lead prosecutor in Libberton's criminal trial.

Norton's statement to Parker was more detailed than his previous statements to the police. Although the

broad outline of his story remained the same, some of the details were inconsistent with those in the previous statements. Based on Wertsching's affidavit, Libberton contends that Norton made a deal with prosecutors that he would be tried as a juvenile; that he made this deal after providing his statements to police but before providing his statement to Parker; and that this deal was not disclosed to Libberton before his trial. Because Libberton contends that prosecutors violated *Giglio* in failing to disclose the deal, and *Napue* in failing to correct Norton's false testimony that there had been no such deal, it is important to compare the statements Norton gave before and after the alleged deal. We therefore recount his statement to Parker in detail.

Before beginning the substance of the tape-recorded interview, Parker stated that at that time there was no deal between Norton and the prosecutors:

> The end result of this interview with you is that we are going to attempt to set up an agreement between you, your attorney and the county attorney's office regarding the charges that are now pending against you in the death of Juan Maya. None of that has been put down in writing at this time, and in fact we haven't even explored what those possibilities may be. It will all depend upon your truthfulness during this interview today.

Wertsching's statements in his post-trial affidavit regarding the existence of an agreement contradict this statement by Parker.

Norton began the interview by explaining that he had

known James for only about a week before Maya was killed, but that he had effectively moved into his trailer. He described James as heavy, with a lot of tattoos, and as "real mean." James claimed that he had killed a number of people and that he had family in the mafia. James was a heavy drug user. Norton described Libberton as having a "bad attitude," though Norton said he "kind of liked me." Norton knew that James had a .44 magnum handgun that he kept under a chair in his living room. James had acquired the gun from a friend "because his wife had been kidnapped from what I hear and he wanted [it] for protection." Norton was unaware of any weapons owned by Libberton.

Norton said that earlier on the night of the crime, he had been at James's trailer with James, Norton's friend "Ralph," Daniel McIntosh, and Libberton. They smoked pot and drank alcohol. At approximately 10:30 pm, Ralph and Norton left the trailer to get dinner. They intended to "dine and dash," meaning to eat at a restaurant and leave without paying, but the restaurant management called the police before they could leave. The police took Ralph and Norton to their respective homes. Norton said that he stayed home for about ten minutes, where he "got something to drink and smoked a couple of joints." He left after his mother gave him a pack of cigarettes.

Norton said that he then walked towards James's trailer, attempting to hitchhike. He was soon picked up by Maya. Maya drove Norton toward James's trailer, but before arriving he stopped, turned off the motor, and moved closer to Norton. According to Norton, Maya did not say anything to indicate what he was doing, but

directed Norton not to interfere. Maya attempted to remove Norton's pants, but Norton pushed him away. According to Norton:

> I couldn't think of a way to get away from him so I told him I said well let's go in the trailer because I have a friend in there who's gay and he'll give you what you want and you don't have to get me, and he said boy I don't know, I don't know you very good.

Norton led Maya into the trailer where they encountered James and Libberton. Norton "quickly went around [James] and [ ] said [James] get him away from me and he looked at me and looked at him and I said he's a queer, get him away from me and [James] kicked him."

Norton said that Maya then attempted to flee. James and Libberton chased him, ultimately catching him and bringing him back to the trailer. James, Libberton, and Norton began to beat Maya. During a pause in the beating, James pulled out his gun, pointed it at Maya, and told Maya to hand over his wallet. James demanded that Maya pull down his pants so James could see if he had anything else hidden on him. Libberton, who had found the title to Maya's car in the wallet, walked over to Maya and demanded that he sign over the title to Libberton. Maya did so.

James then asked what they were going to do with Maya. Libberton suggested letting him go, but James said they could not do that. James asked Norton what he thought, and Norton suggested beating him up some more. James responded that they would have to kill

him. Norton said that Libberton

> looked at [James] kind of funny and [James] said [gap in the transcription] and [Libberton] said well I think your [sic] right in a way and then[James] said in a way, in a way what? [Libberton] said in a way that if we're caught we'll be [gap in the transcription] for murder. [James] said there's no way we'll get caught because I know a perfect place to put a body.

Norton said that Libberton and James then began to discuss the plot to murder Maya. The four of them left James's trailer and departed in Maya's car. James drove while Libberton sat in the back seat with the gun pointed at Maya.

Norton said that James stopped at a gas station where he filled the car with gas and bought a carton of cigarettes, both paid for with Maya's credit card. Norton described the car as "totally quiet all the way" out to the mine. At some point during the trip, the car was stopped for speeding. James quickly got out of the car and walked back to the police officer, who apparently did not give James a ticket. The officer never came close enough to the car to see Maya, and Libberton kept the gun pointed at him in the car. After they began driving again, Maya fell asleep. When they were approximately five miles from the mine, Norton asked James not to kill Maya. James responded that "we went this far, we're going to go all the way."

Norton said that when they arrived at the mine, Libberton opened the door of the car to let Maya out. Norton said, "I shook [Maya's] hand and I said [Maya],

I'm sorry this has to happen." James stood at the top of a hill next to the mine and told the others to come up. Libberton walked behind Maya, holding the gun on him. James allowed Maya to finish a cigarette, after which Maya began pleading for his life. James pointed the gun at Maya and pulled the trigger. The gun apparently misfired. Maya then jumped at James, grabbed the gun, and pulled it toward his chest. James tried and failed to recover his weapon, and Libberton attempted to retrieve the gun by hitting Maya with a rock. Maya held onto the gun until Libberton, using a board handed to him by Norton, hit him on the back. James then grabbed the gun and tried to shoot Maya again. It is unclear from Norton's statement if a bullet hit Maya, but Norton reported seeing blood on Maya's right arm. James then handed the gun to Norton, but Norton either did not or could not shoot it. Norton then handed the gun to Libberton. According to Norton, Maya was still breathing at this point, but was "almost dead."

> [Maya] was just going uh uh breathing really hard and rapidly and [Libberton] put the gun about 10 inches from his head and pulled the trigger. He wasn't breathing anymore. A gurgling sound started coming out. [James] didn't know what was going on. That son of a bitch ain't dead yet. So he picked up a real heavy rock, it was heavy because he barely put it up and slammed it down on his head.... [James] threw the rock on his head, [Libberton] picked up the exact same rock and threw it on his head, and then [James] pointed over to me and said it's your turn to throw the rock on his head.

Norton threw a different rock that hit Maya's head. James then walked over to Maya and determined that he was dead.

Norton said that Libberton and James dragged Maya by his belt loops up to the mine shaft and dropped him in. The three of them then returned to Maya's car. James then said, "Norton, you say one word to anybody, I mean anybody, even Ralph, I'll kill you." Libberton added, "[Y]ea, you'll find your body right next to [Maya]." They then drove back to Phoenix. Norton said that he slept the entire way. After arriving at James's trailer, James and Libberton went to pick up Dan McIntosh and directed Norton to clean up the trailer.

At the end of the interview, Parker asked why Norton had told a different story to police. Norton replied that he had been scared because he knew that he could be charged with murder.

At some point after his interview with Parker, Norton signed an undated plea agreement in which he agreed to testify in any proceeding relating to Maya's murder, and to do so in a manner consistent with the statement he had provided to Parker. In exchange for his testimony, the state agreed not to prosecute Norton as an adult. Norton agreed to "admit in Juvenile Court to the allegations of First Degree Murder, Kidnapping, and Armed Robbery."

B. Guilt-Phase Trial

Libberton was charged with first degree murder,

aggravated robbery, kidnapping, and theft. Trial began on June 23, 1982, in Maricopa County Superior Court. Libberton was represented by George Lim.

Norton testified on June 28. Parker, acting as lead prosecutor, questioned him. The substance of Norton's testimony was largely consistent with what he had said in his interview with Parker. We recount here only the inconsistencies:

First, Norton testified that Libberton agreed without hesitation with James's suggestion that they had to kill Maya in order to conceal their other crimes. In his interview with Parker, however, Norton had said that Libberton had suggested that they let Maya go, and that James had then convinced him that they should kill Maya. Lim pointed out this discrepancy on cross-examination, and Norton responded that "[i]t was either me or him," and that "I can't remember everything that happened." Later in his testimony, Norton stated that both he and Libberton had suggested releasing Maya.

Second, Norton testified that while James was speaking with the police officer who stopped the car on the way to the mine, Libberton told Maya that if he said anything Libberton would shoot him. Norton had not mentioned this in his interview with Parker.

Third, Norton testified that once they arrived at the mine Libberton walked up to the mine shaft first, Maya went up behind him, and James followed Maya with the gun. In his interview with Parker, Norton had said that James had led the way up the hill, and that

Libberton had followed Maya with the gun. Lim pointed out this discrepancy on cross-examination. Norton responded that his earlier statement to Parker "might have been mistaken."

Finally, Norton never testified that he had held James's gun. In his interview with Parker, he had stated he had held the gun, but that he either did not or could not shoot it.

Parker was at pains to emphasize during her examination that Norton's earlier statements had not been given in consideration for a deal of any kind. Parker asked: "When you were interviewed at Durango by Detective Hackworth, did he promise you anything?" Norton responded: "No." "[D]id you know whether or not you would be treated as a juvenile or an adult in the prosecution?" Norton responded: "No." "Did you indicate that you would testify against Laurence Libberton and Steven James?" Norton responded: "No." Parker next asked whether Norton had been offered any deal when she had interviewed him. Norton responded: "No." Parker then established that Norton had entered into a plea agreement after his interview with her, whereby he agreed to testify truthfully against Libberton and James, and that Norton had then pled guilty and was sentenced in juvenile court.

Parker delivered her closing statement on June 30. She emphasized that, other than the plea agreement, Norton had never been offered anything in exchange for telling a particular story. Specifically, she told the jury that "at no time when [Norton] talked to Detective

Hackworth, initially, or at no time when he talked to me, did he have anything, nothing, except a conscience, probably at that point. That's why he got up there and told what happened." Elsewhere, Parker noted that Norton "received no deal other than he would testify down in Juvenile Court. And when he first talked about testifying, he had received nothing."

The jury deliberated for less than a day and returned a verdict of guilty on all charges.

C. Penalty-Phase Trial

[1] A sentencing hearing was held on October 20, 1982. At that time, Arizona law provided that the judge rather than the jury decide whether to impose the death penalty. This procedure was later declared unconstitutional in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). However, *Ring* is not applied retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

The prosecution called two witnesses to testify at the sentencing hearing. The defense also called only two witnesses. (As we discuss below, an effective defense counsel would have discovered and presented extensive additional evidence.) The judge also had before him two psychological reports that were prepared in advance of the hearing, as well as a presentence report ("PSR") prepared by the Arizona state probation office. The judge sentenced Libberton to death on October 25, 1982.

D. Direct Appeal

Libberton appealed his conviction and sentence to the Arizona Supreme Court. That Court addressed six issues: (1) whether the verdict forms were improper; (2) whether the sentencing judge's failure to find beyond a reasonable doubt that Libberton killed Maya was reversible error; (3) whether permitting a judge to find aggravating and mitigating circumstances was unconstitutional; (4) whether it was unconstitutional for the Arizona statute not to provide guidelines on balancing aggravating and mitigating circumstances in capital cases; (5) whether it was fundamental error to admit evidence of Libberton's absence from work furlough; and (6) whether one of the aggravating factors was properly applied to Libberton. *See Arizona v. Libberton*, 141 Ariz. 132, 685 P.2d 1284, 1286-87 (1984). The state Supreme Court affirmed on each issue.

E. State Court Post-Conviction Proceedings

Libberton filed a number of state post-conviction petitions ("PCR Petitions"). His first was filed on July 27, 1984. It claimed ineffective assistance of trial counsel ("IAC") "at every critical stage of the proceeding." This petition was summarily denied on October 16, 1984. Libberton filed a second PCR Petition on April 26, 1985, in which he claimed IAC by his appellate counsel. This petition was summarily denied on March 13, 1986. In both petitions, Libberton requested an opportunity to present evidence relating to his claims. Both requests were denied.

In December 1986, Libberton sought habeas corpus in federal district court, asserting thirty-nine claims. *Inter alia,* the petition claimed that Libberton's trial counsel had been unconstitutionally ineffective during both the guilt and penalty phases. Libberton asked the district court for leave to conduct discovery. *Inter alia,* he asked for permission to depose McIntosh, who had been with Libberton at the time of his arrest but had not participated in Maya's murder. Libberton noted that McIntosh's deposition was necessary in order to preserve his testimony because he planned to leave the state within a few weeks. Libberton later withdrew this request because McIntosh decided not to leave the state. Proceedings relating to Libberton's federal petition were stayed on June 30, 1987 to permit Libberton to exhaust some of his claims in state court.

Libberton filed a third PCR Petition in state court on September 14, 1987, asserting forty-eight claims. Some of those claims had been raised in previous PCR Petitions, but were raised again to "avoid any argument by the state that petitioner is procedurally barred from raising them in later federal habeas corpus proceedings for failing to raise them now." The PCR petition further noted that "there is newly discovered evidence relating to petitioner's claims of ineffective assistance of trial and appellate counsel." The petition claimed that Libberton was denied effective assistance of counsel at both trial and sentencing. Libberton again requested funds to pursue discovery, as well as an evidentiary hearing.

On February 10, 1988, the state court denied Libberton's third PCR Petition. The judge who ruled on

the petition was the same judge who had presided over Libberton's trial and had imposed the death sentence. The court wrote, "Having presided at the trial of this case, this court is of the opinion that nothing defendant has raised in his current petition for post-conviction relief would have affected the outcome of the trial or the sentencing." The court wrote, "[T]he defendant received nothing but effective assistance of three very experienced and qualified criminal attorneys." The court denied funds to pursue discovery and denied an evidentiary hearing.

Libberton returned to federal district court, filing a second amended habeas petition on September 30, 1991. On April 8, 1992, Libberton asked the court for leave to conduct discovery. Specifically, he asked for and was granted permission to depose Lim, McIntosh, and a third man, Harry Dean. Soon thereafter, lawyers working on James's federal habeas petition asserted for the first time that Norton had received an undisclosed deal from prosecutors. James and Libberton had been aware, at the time of their trials, of the conditions of Norton's plea agreement. But James's attorneys now asserted that Norton had received an earlier, undisclosed deal, before his interview with Parker, wherein he agreed to provide a statement and then to testify in a manner consistent with that statement in return for an agreement that he would not be tried as an adult. James's attorneys supported their assertion with an affidavit signed by Norton's attorney, Robert Wertsching.

The district court dealing with James's federal habeas petition concluded that

> for purposes of challenging a witnesses' credibility, there may be a significant difference between a statement given in reliance upon a negotiated deal, and an unsolicited statement which is given and then, to ensure the witnesses' testimony at trial, a plea agreement is negotiated. One provides incentive for a witness to testify, while the other may provide motivation for the statement itself.

In light of the Wertsching affidavit, the district judge dealing with Libberton's federal habeas petition agreed to let him return to state court to exhaust any claims relating to the affidavit.

The parties in Libberton's case stipulated to dismiss his federal habeas petition without prejudice in order to allow him to exhaust any Wertsching-related claims. The written stipulation provided that "Libberton's Third Amended Petition for Writ of Habeas Corpus may be dismissed without prejudice." The stipulation went on to provide, "Petitioner shall, if necessary, file an amended federal petition for writ of habeas corpus within 30 days after conclusion of the state post conviction and related proceedings." The district court signed the stipulation, and the order was filed on February 9, 1994.

Libberton returned, once again, to state court, filing a fourth PCR Petition on September 12, 1994. He once again sought discovery, which was denied. Libberton claimed in his PCR Petition that the prosecution had unconstitutionally failed to inform him of Norton's "secret" plea agreement described in the Wertsching

affidavit. The state submitted an affidavit by Parker, who denied that there had been such a deal. She stated, "I never made any promise of any kind to Norton's attorney that Norton would not be transferred for prosecution as an adult if he cooperated by testifying against Libberton and James." Warren Smoot, the Chief of the Juvenile Division at the time of Libberton's prosecution, and William Molner, an assistant to Smoot, submitted similar affidavits.

The state court concluded that it was unnecessary to decide whether there had, in fact, been a secret deal because, in its view, Libberton's claims would fail in any event. The court reasoned that Norton's earlier statements to police, which predated Norton's alleged deal with the prosecutor and his interview with Parker, were already incriminating. Because those earlier statements would have been available to bolster or rehabilitate Norton's trial testimony, the state court concluded that the jury would likely have returned the same verdict even if such a deal had been made.

The state court also had before it an affidavit signed by Norton in October 1991, almost ten years after Libberton's trial. This affidavit had not previously been presented to either state or federal court. In the affidavit, Norton offered descriptions of Libberton's role in the murder, and descriptions of the murder itself, that contradicted his statements to police and to Parker, as well as his trial testimony.

In the affidavit, Norton described James as the clear leader of the assault and the subsequent murder. James "beat Maya up pretty bad and told Libberton

and me to hit Maya too. We did as he ordered." Norton further stated that it had been James who ordered Maya to sign the title of his car over to Libberton. In his interview with Parker and in his trial testimony, Norton had said that it had been Libberton rather than James who had forced Maya to sign over the title. Norton also stated that both he and Libberton had "said that beating [Maya] up was enough and we should let him go. James said Maya would call the cops or come back to kill us. He insisted that Maya had to be killed." Norton went on, "Libberton and I both tried to talk James out of killing Maya. I specifically remember Libberton saying that he did not want to kill Maya and that Maya had done nothing to him." Norton explained that both he and Libberton went along with James because they were "scared" and "knew that James could kill us if we stood in his way."

Norton stated in the affidavit that on the way to the mine, Libberton had never actually pointed the gun at Maya and had never threatened him. At trial, however, Norton had testified that Libberton had pointed the gun at Maya and threatened to kill him. Norton further stated in the affidavit that James had ordered him and Libberton to participate since "he wanted [them] to be involved as he was." Norton concluded that "James was the leader in everything that happened on that night," and that "[d]uring that night, Libberton tried many times to talk James out of killing Maya. To the extent Libberton participated, it was because James told him to. Acting alone, Libberton would not have killed Maya. Libberton did not want Maya to be killed."

The state court refused to consider Norton's affidavit because it "raises grounds that have been precluded" by Libberton's previous petitions. According to the court, the information in the affidavit could have been "discovered through the exercise of due diligence before the prior three petitions for Post-Conviction Relief were filed.... The affidavit now presented could have been prepared in 1982, or at any time thereafter."

The state court denied Libberton's fourth and final PCR Petition on November 21, 1996. Libberton petitioned the Arizona Supreme Court for review on May 12, 1997. Libberton's petition was denied on June 24, 1997.

F. Current Federal Habeas Proceeding

Libberton filed a habeas petition in federal court on September 9, 1997, and an amended petition on February 17, 1998. The amended petition asserted forty-seven claims for relief. The district court denied the petition in its entirety on September 18, 2007.

Five questions are before us on appeal. First, is Libberton's federal habeas petition governed by AEDPA? Second, did the State violate *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by failing to reveal an alleged deal between Norton and prosecutors? Third, did the State violate *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), by failing to correct Norton's allegedly false testimony that there had been no such deal? Fourth, did the State violate *Tennard v.*

Dretke, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), by requiring a causal nexus between mitigating evidence and the crime of conviction? Fifth, did Libberton's trial counsel provide unconstitutionally ineffective assistance with respect to the penalty phase, in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)?

II. Standard of Review

[2][3] We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo a district court's denial of habeas corpus. *Lopez v. Schriro*, 491 F.3d 1029, 1036 (9th Cir.2007). We review for clear error a district court's findings of fact. *Richter v. Hickman*, 578 F.3d 944, 950-51 (9th Cir.2009).

AEDPA provides that a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court has explained that "[t]he threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state-court

conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

[4][5][6][7] "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Id.* At 365, 120 S.Ct. 1495. A state court decision is "contrary to" Supreme Court law if "the state court applies a rule that contradicts the governing law set forth in[Supreme Court] cases." *Id.* At 405, 120 S.Ct. 1495. "A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* At 406, 120 S.Ct. 1495. An unreasonable application of Supreme Court precedent occurs when a "state-court decision ... correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* At 407-08, 120 S.Ct. 1495.

[8] This standard under AEDPA is somewhat different when the state court does not provide a reasoned decision. When a state decision is unreasoned, we must "independently review the record to determine whether the state court clearly erred in its application of Supreme Court law. That is, although we independently review the record, we still defer to the state court's ultimate decision." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir.2002) (internal citation omitted).

III. Discussion

A. Applicability of AEDPA

[9] Libberton argues that AEDPA does not apply to his federal habeas petition. He concedes that his most recent federal petition was filed after the effective date of AEDPA, but he contends that it relates back to the filing date of his earlier pre-AEDPA petition, and is therefore governed by pre-AEDPA law. The district court rejected this argument and analyzed the petition under AEDPA. For the reasons explained below, we agree with the district court.

In effect, Libberton argues that the district court never really dismissed his earlier pre-AEDPA habeas petition, and that his post-AEDPA petition was merely an amendment to the earlier petition. First, he points us to the wording of the district court's dismissal of his pre-AEDPA petition. That order, while termed a "dismissal," also provided that "Petitioner shall, if necessary, file an *amended* federal petition for writ of habeas corpus within 30 days of the conclusion of the state post conviction and related proceedings." (Emphasis added.) Libberton places great weight on the word "amended," contending that the district court must have retained jurisdiction over his pre-AEDPA petition in order for him to be able to amend it.

Second, Libberton contends that his case is analogous to *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). In *Rhines*, the Supreme Court approved the procedure of staying and abeying a habeas petition, whereby a district court retains jurisdiction over a habeas petition while state law

claims are being exhausted. Because Libberton's habeas petition was dismissed to enable him to exhaust his Wertsching-related claims in state court, Libberton argues that his case was functionally stayed and abeyed, despite the order's use of the term "dismissed."

Neither the language of the district court's dismissal of Libberton's earlier petition nor *Rhines* is sufficient to maintain Libberton's argument. First, there is more to the language of the order than Libberton suggests. The district court's dismissal order explicitly "incorporate[d] to the extent applicable the order issued by the Honorable Roger G. Strand" in Steven James's habeas proceeding, in which the Wertsching affidavit had first been presented. Unlike Libberton, James had specifically requested that Judge Strand stay and abbey his case. Judge Strand declined to do so. He discussed the typical justifications for stay and abeyance rather than dismissal and concluded that none of those justifications applied to James's case. The incorporation of Judge Strand's order, which explicitly refused to stay and abbey James's habeas petition, into the dismissal of Libberton's petition is incompatible with a conclusion that Libberton's case was stayed and abeyed.

Second, *Rhines* does not help Libberton. *Rhines* did approve the use of the stay-and-abeyance procedure in certain circumstances, but it cannot be read to convert the district judge's dismissal in this case into a stay and abeyance. In *Rhines*, the petitioner requested a stay, and the Supreme Court noted that had the district court denied the request, it may have been

error. 544 U.S. at 278, 125 S.Ct. 1528. Libberton, however, never requested a stay, and thus the district judge never denied one. On the contrary, Libberton and the state submitted a stipulation and a proposed order, and the district judge adopted it. While the order did refer to any later petition as "amended," the order was clearly titled a dismissal.

We therefore conclude that AEDPA applies to Libberton's petition.

B. *Giglio* Claim

[10] As he did in the district court, and in state court before that, Libberton argues that the prosecution's failure to disclose its alleged secret deal with Norton constitutes a violation of due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Neither the state court nor the district court made a finding as to whether such a deal in fact existed, but each court concluded that even if it did, the oral agreement was not material evidence, and therefore no *Giglio* error occurred. We agree with these courts that the agreement, if it existed, was not material within the meaning of *Giglio*. The state court's reasoned opinion rejected this claim, and the opinion is neither objectively unreasonable nor clearly contrary to binding Supreme Court law.

In *Giglio*, a defendant learned during the course of his appeal that "the Government had failed to disclose an alleged promise made to its key witness that he would

not be prosecuted if he testified for the Government." *Id.* At 150-51, 92 S.Ct. 763. The Court noted that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Id.* At 154, 92 S.Ct. 763 (quotation marks omitted). The Court went on to conclude that the nondisclosure was material under *Brady*:

> Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

Id. At 154-55, 92 S.Ct. 763. The Court therefore reversed the judgment and remanded for a new trial.

The pivotal question under *Brady* and *Giglio* is whether the evidence withheld from the jury is material. The Supreme Court has explained this materiality standard as follows:

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Libberton argues that *Giglio* requires that he be granted a new trial or at least a resentencing. He contends that in his case, as in *Giglio*, the prosecution never disclosed its oral deal with Norton, and that Libberton was only made aware of the deal ten years after it was made. Libberton contends that the prosecution's statements at trial illustrate the materiality of the alleged oral deal. *Cf. Kyles*, 514 U.S. at 444, 115 S.Ct. 1555 ("The likely damage [of suppressed impeachment evidence] is best understood by taking the word of the prosecutor...."). In her closing argument at trial, lead prosecutor Parker emphasized that at the time of her interview with Norton, he had "received no promises." She did so because the jury was aware that Norton had signed a plea agreement in which the prosecution agreed to prosecute Norton as a juvenile in exchange for his testimony. Parker sought to avoid an inference that Norton's testimony was biased because of this agreement by pointing to the statements Norton had given before signing the deal, including his interview with her. Libberton argues that the undisclosed deal gave Norton a motivation to lie in his interview with Parker, and that if the jury had been aware of the deal it would have been reasonably likely to reach a different verdict.

We disagree. Unlike in *Giglio*, the key witness in this case, Norton, had already given a deeply incriminating statement to Detective Hackworth before the alleged deal was entered into. Therefore, the government could have pointed to a statement untainted by any secret

deal, if such a deal existed, in order to corroborate Norton's trial testimony. Unlike in *Giglio*, where the jury was unaware of *any* deal with prosecutors, the jury in Libberton's case was well aware that Norton had reached a plea agreement with prosecutors whereby he agreed to testify in exchange for being prosecuted as a minor. The question is not whether Norton made a deal with prosecutors, but only when he did so. Given the availability of Norton's earlier statement to Hackworth as corroboration of his trial testimony, it is unlikely that the jury would have reached a different conclusion as to Libberton's guilt even if it had known of the alleged oral agreement.

C. *Napue* Claim

[11] Libberton makes a related claim under *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). In *Napue*, the prosecuting attorney asked the key witness whether "he had received[a] promise of consideration in return for his testimony." *Id.* At 265, 79 S.Ct. 1173. The witness responded that he had not. However, "[t]he Assistant State's Attorney had in fact promised him consideration, but did nothing to correct the witness' false testimony." *Id.* The Court noted that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* At 269, 79 S.Ct. 1173.

[12][13] Libberton argues that a *Napue* violation

occurred when Parker failed to correct Norton's testimony that he had not received a deal before she interviewed him. A *Napue* violation, however, also requires that the false evidence be material. *See, e.g., Jackson v. Brown*, 513 F.3d 1057, 1075-76 (9th Cir.2008) ("A jury's finding should be overturned as a result of ... [a] *Napue* violation[ ] if and only if [it is] material."). While the precise materiality standard under *Napue* is slightly different than under *Giglio*, the result in this case is the same. Instead of asking whether there was a "reasonable probability" of a different outcome, a *Napue* violation requires a court to ask whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir.2005) (en banc). For the reasons explained above, we conclude under AEDPA that Libberton's *Napue* argument does not succeed.

D. *Tennard* Claim

[14] Libberton argues that the state trial court failed to consider all relevant mitigating evidence. He contends that *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), which was handed down while his case was pending before the district court, provides him relief. This argument was never presented to any state court and is therefore not exhausted. *See Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). "A federal court may not grant habeas relief to a state prisoner unless the prisoner has first exhausted his state court remedies" by "fully and fairly presenting each claim to the highest state court." *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir.2009). *See also* 28

U.S.C. § 2254(b)(1)(A).

E. Ineffective Assistance of Counsel with Respect to Penalty Phase

Libberton claims that his counsel provided unconstitutionally ineffective assistance with respect to the penalty phase.

1. Expansion of the Record

[15] Libberton's argument in support of his IAC claim relies in part on evidence that was not presented to the state courts. The district judge in Libberton's federal habeas proceeding concluded that Libberton had not been diligent in pursuit of some evidence, and he therefore declined to admit it. For the reasons that follow, we conclude that Libberton diligently pursued the disputed evidence, and we therefore consider the evidence he sought unsuccessfully to present to the district court.

[16] "Rule 7 of the Rules Governing § 2254 cases allows the district court to expand the record without holding an evidentiary hearing." *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241 (9th Cir.2005) (citing 28 U.S.C. foll. § 2254, R. 7). However, before the record may be supplemented with new evidence, a petitioner must meet the same standard that is required for an evidentiary hearing. *Id.* In order to be awarded an evidentiary hearing, a petitioner must either: (1) satisfy the requirements of 28 U.S.C. § 2254(e), or (2) show that he "exercised diligence in his efforts to develop the factual basis of his claims in state court

proceedings." *Id.* At 1241;*see also* *Holland v. Jackson*, 542 U.S. 649, 652-53, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004). Libberton argues that he diligently pursued evidence in his state court proceedings, and that we should therefore expand the record to include his new evidence.

[17] While "diligence" has not been precisely defined in this context, the Supreme Court has advised that "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams v. Taylor (Williams II)*, 529 U.S. 420, 437, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). *Williams II* specifies that the proper question when considering a petitioner's diligence "is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." *Id.* At 435, 120 S.Ct. 1495. In this case, Libberton repeatedly asked the state court to grant an evidentiary hearing in which he could develop the facts relating to his IAC claim. He also repeatedly asked the state court to provide funds to aid him in his investigation. These requests were consistently rejected by the state court. Despite his indigence and the state court's refusal to provide an evidentiary hearing, Libberton was nonetheless able to acquire some affidavits relevant to an assessment of his counsel's conduct at sentencing. He presented these affidavits to state court. That court refused to give him an opportunity to develop more evidence and rejected his claims on the merits.

Despite Libberton's diligence in state court, the district court concluded that Libberton was not diligent with

respect to some evidence that he failed to present to the state court. While the district court is correct that this new evidence could possibly have been discovered while Libberton was litigating in state court, the question is simply "whether the prisoner was diligent in his efforts." *Williams II*, 529 U.S. at 435, 120 S.Ct. 1479. Given the wealth of evidence that Libberton was able to present to the state court despite the state court's refusal to provide funds to aid in his investigation, and despite the lack of an evidentiary hearing in state court, Libberton was remarkably successful in finding and presenting evidence to state court. He did not discover all of the relevant evidence, as is apparent from the new affidavits he sought to present to the district court. But it is clear that he was diligent in pursuing it. *Cf. Correll v. Stewart*, 137 F.3d 1404, 1413 (9th Cir.1998) ("Simply put, the state cannot successfully oppose a petitioner's request for a state court evidentiary hearing, then argue in federal habeas proceedings that the petitioner should be faulted for not succeeding."). We therefore expand the record to include a deposition of his trial counsel, George Lim, as well as affidavits of Martin Norton and Dan McIntosh.

2. Ineffective Assistance with Respect to Sentencing

Libberton argued to the district court that his counsel at trial and sentencing, George Lim, was unconstitutionally ineffective. He appeals the denial of his ineffectiveness claim only as to sentencing. Partly in reliance on the evidence not presented to the state court and excluded by the district court, we conclude that Libberton's representation with respect to sentencing was unconstitutionally ineffective.

a. Preliminary Observations

[18] Before reaching the merits of Libberton's IAC claim, we note two things. First, the state court's order denying his IAC claims was unreasoned. That order provided no citations to state or federal law and simply noted that "defendant received nothing but effective assistance of three very experienced and qualified criminal attorneys." Libberton had only one attorney at trial and at sentencing; we assume that the court was also referring to his appellate counsel. The state court concluded, without addressing any of Libberton's arguments or evidence, that "nothing defendant has raised in his current petition for post-conviction relief would have affected the outcome of the trial or the sentencing." Given this lack of reasoning, we "independently review the record to determine whether the state court clearly erred in its application of Supreme Court law." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir.2002); *see also Musladin v. Lamarque*, 555 F.3d 830, 835 (9th Cir.2009). We also note that the state court did not have before it some of the evidence that is now before us. This new evidence, which Libberton diligently pursued but did not discover while in state court, adds substantially to Libberton's ineffectiveness arguments.

[19] Second, a common shorthand for an IAC claim is "ineffective assistance during the penalty phase." If taken literally, this shorthand is misleading. The question is whether a defendant's counsel was ineffective with respect to the penalty imposed, irrespective of when during the proceedings the

counsel was ineffective. It is often the case that a counsel's ineffectiveness is manifested during the penalty phase, as the common shorthand suggests. For example, defense counsel may have failed to discover a witness who would have testified favorably during the penalty phase. But ineffectiveness is often manifested earlier. For example, defense counsel may have failed to discover impeaching evidence that could have been used against an unfavorable witness who testified during the guilt phase, and which would have portrayed the defendant in a light that would have assisted him at the penalty phase. As we wrote in *Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir.2005), "The combination of counsel's guilt and penalty phase deficiencies ... den[ied] Daniels effective representation and prejudiced the outcome of his penalty phase trial." *See also* *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir.1999) ("[C]ounsel's deficient performance, including counsel's performance during the guilt phase of Moore's trial, prejudiced the outcome of the punishment phase of Moore's trial."); *Slagle v. Bagley*, 457 F.3d 501, 528 (6th Cir.2006); *Cargle v. Mullin*, 317 F.3d 1196, 1208-09 (10th Cir.2003).

b. Merits of Penalty Phase IAC Claim

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), provides that, in order to establish ineffective assistance of counsel, one must show both deficient performance and prejudicial effect. To establish deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* At 688, 104 S.Ct. 2052. To establish prejudice he must show "that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* At 694, 104 S.Ct. 2052.

Three recent Supreme Court opinions address an attorney's obligation to conduct an investigation in preparation for a sentencing hearing in a capital case. All three cases were decided under the standards established in AEDPA.

First, in *Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), an attorney's "representation during the sentencing phase fell short of professional standards." The Supreme Court explained that defendant's counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* Had this investigation occurred:

> the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id. The Court noted that "[o]f course, not all of the additional evidence was favorable to Williams." *Id.* At

396, 120 S.Ct. 1495.

The Court disagreed with the state court's analysis of prejudice, noting that it "was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-in reweighing it against the evidence in aggravation." *Id.* At 397-98, 120 S.Ct. 1495. The Court held that if all the mitigation evidence had been presented to the jury, it "might well have influenced the jury's appraisal of his moral culpability," and that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* At 398, 120 S.Ct. 1495.

Second, in *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), defendant's IAC claim "stem[med] from counsel's decision to limit the scope of their investigation into potential mitigating evidence." The state argued that the limited investigation "reflect[ed] a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternative strategy instead." *Id.* The Court rejected this argument. The Court noted that Wiggins's counsel investigated three sources of mitigating evidence: a psychologist's report, the presentence report, and social service records. *Id.* At 523, 123 S.Ct. 2527. Despite the fact that funds were available, Wiggins's counsel did not order a report from a forensic social worker. *Id.* At 524, 123 S.Ct. 2527. The Court further noted that ABA Guidelines require that investigations into mitigating evidence "should

comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* (quotation marks omitted). The Court concluded that "[t]he record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Id.* At 526, 123 S.Ct. 2527. Given the fact that counsel did not investigate beyond the evidence described above, the Court concluded that they "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* At 527-28, 123 S.Ct. 2527.

The Court concluded that the "mitigating evidence counsel failed to discover and present in this case is powerful," and that the failure to discover it was prejudicial. *Id.* At 534, 123 S.Ct. 2527. Wiggins had been abused as a young child, including "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." *Id.* At 535, 123 S.Ct. 2527. Wiggins was also homeless for a time, and had "diminished mental capacities." *Id.* "Given both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form." *Id.* "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* At 537, 123 S.Ct. 2527.

Third, in *Rompilla v. Beard*, 545 U.S. 374, 381, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the Court described the defense attorney's pre-sentence investigation, noting that "[t]his is not a case in which defense counsel simply ignored their obligation to find mitigating evidence." Defense counsel interviewed some members of Rompilla's family and examined the reports of three mental health experts. In all, Rompilla's lawyers spoke with five members of Rompilla's family in a "detailed manner" in an attempt to unearth mitigating information. *Id.* Those family members, however, "didn't really feel as though they knew him all that well." *Id.* At 382, 125 S.Ct. 2456. During Rompilla's post-conviction process, new counsel pursued evidence that his trial counsel had never investigated, including school records, records of Rompilla's juvenile and adult incarcerations, and evidence of Rompilla's history of alcohol abuse. *Id.* Most important, Rompilla's post-conviction attorneys investigated the court file on Rompilla's prior conviction, which his trial counsel had not done. *Id.* At 383, 125 S.Ct. 2456.

The Court concluded that the unexamined court file led to mitigating evidence of sufficient persuasive power that counsel's ineffective assistance had prejudiced Rompilla. The file revealed that both Rompilla's parents were severe alcoholics who drank constantly, and that Rompilla's father "frequently beat Rompilla's mother." *Id.* At 391-92, 125 S.Ct. 2456. Rompilla's father abused him physically and verbally. *Id.* At 392, 125 S.Ct. 2456. Medical experts discovered that Rompilla had organic brain damage and had likely

suffered from fetal alcohol syndrome. *Id.* The Court concluded that "[t]his evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test." *Id.* At 393, 125 S.Ct. 2456. Since the mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal of [Rompilla's] culpability," the Court remanded either for resentencing or for stipulation to a life sentence. *Id.* (quotation omitted and alteration in original).

i. *Strickland's* Deficient Performance Prong

[20] Under the Court's analysis in *Williams*, *Wiggins*, and *Rompilla*, Lim's performance at Libberton's sentencing hearing was deficient. Lim called only two mitigating witnesses, both of whom were only tenuously connected to Libberton. One had not seen Libberton in ten years. The other was the mother of an ex-girlfriend. Lim did not interview Libberton's sister, who could have been easily located. And while Lim did talk with Libberton's mother, he did not ask her to testify. As a consequence, the only information from Libberton's family that made its way to the judge was contained in the PSR. The PSR contained Libberton's father's damning conclusion that "his son is a liar and a thief." The PSR paraphrased Libberton's father as stating that he "does not doubt that the defendant actually committed this crime and, in fact, believes [Libberton] may have been the leader in planning the crime." Lim made no attempt to impeach the father's comments.

Lim also did not pursue evidence of James's primary responsibility for the crime. He said at the sentencing hearing that Libberton had not been the driving force behind the murder, but he did not present any testimony or evidence to that effect. He could have interviewed a number of witnesses, all of whom would have confirmed James's violent nature and mental state on the day of the crime. Lim also did not investigate Norton's background; as seen above, Norton described Libberton at trial as an equal participant with James in Maya's murder. If Lim had conducted an adequate investigation of Norton's background, he would have discovered powerful psychological evidence showing Norton to be an unreliable witness.

The Supreme Court has found deficient performance even where a lawyer did far more than Lim did in this case. The Court in *Rompilla* wrote, "This is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts, including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase." 545 U.S. at 381, 125 S.Ct. 2456. The Court went on to specify that the lawyers "spoke with five members of Rompilla's family (his former wife, two brothers, a sister-in-law, and his son)." *Id.*

Lim's deposition, in conjunction with the minimal presentation of mitigating evidence at Libberton's

sentencing, conclusively establishes that Lim's performance was worse than that of the attorneys in *Rompilla*. During the four months between conviction and the sentencing hearing, Lim spent very little time preparing for sentencing. In his deposition, Lim did not recall interviewing any witnesses for trial, and only a very few witnesses for sentencing. The two witnesses he did present at sentencing had only tangential knowledge of Libberton's family history, and had no knowledge whatsoever about the details of the crime and Libberton's role in it. Lim obtained funds to hire an investigator, but the investigator never interviewed anyone. Lim acknowledged in his deposition that "[p]erhaps it might have helped to interview a couple of the witnesses." He further admitted in his deposition that he never interviewed Norton, and that he never tried "to talk to anybody to find out background information about Norton, whether he was a truthful person." No possible strategy could justify this lack of diligence in pursuing mitigating evidence. Under *Williams*, *Wiggins*, and *Rompilla*, Lim's conduct fails the first prong of *Strickland*.

ii. *Strickland's* Prejudice Prong

[21] The state PCR court and the federal district court concluded that Libberton had failed to establish prejudice. We disagree. The Supreme Court has explained that the prejudice inquiry requires us to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. We therefore begin by recounting the evidence that was presented to the jury. We then describe the evidence Lim failed to discover

and present, and analyze how that evidence would have materially changed the sentencing calculus.

a. The evidence at sentencing

The prosecution and Libberton each called two witnesses to testify at the sentencing hearing. The state's witnesses, Carl Hass and Bill Fitzgerald, both testified that Libberton had walked away from a work furlough program in the days before Maya's murder.

Lim called Nancy Henry and Geraldine Smith. Henry was a friend of Libberton's mother, but she explained that until the time of the crime she had not seen Libberton in ten years. She testified that Libberton had a "love-hate relationship with his father," and that "he tries to please his father but can't." She testified that Libberton's father "disappointed him a lot," and "at times ran him down." She further explained that she had visited Libberton in jail, and he admitted to having used drugs. Finally, she testified that she did not consider Libberton a violent person, and that "he is more of a follower."

Smith testified that she was the mother of one of Libberton's ex-girlfriends. She had known Libberton for a few years, and he had lived in her home for approximately a month. Like Henry, Smith testified that Libberton had "difficulties with his father," and that he "would try and go forward, [but] his dad would knock him down, and now he is here today because of his dad." She explained that Libberton's father had refused to pay Libberton for work done at the father's business, and that Libberton "broke into his dad's

place, because his dad owed him money and his dad wouldn't pay him." She also reported that Libberton had used drugs regularly, and that he was not a violent person. On cross-examination, Smith admitted that she had not talked with Libberton in a long time, "not since my daughter and him broke up." Smith also explained that Libberton had suffered an injury as a child falling out of a vehicle, that he had once been hit by his stepmother over the head, and that he had once been hit over the head with a bat. As a consequence, "[h]e had terrible, terrible headaches" and tried to go see a doctor. However, his father would not help him pay, so he never went.

In Lim's closing, he emphasized that Libberton had a troubled relationship with his father, and that there was no record of Libberton having previously committed any violent crimes. Lim also pointed to Libberton's psychological issues, and said that he had previously tried to get psychological help. Lim stated that "Libberton appeared to be a follower rather than the instigator and that Mr. James apparently wanted the person killed," and that Libberton was really "like a blind sheep."

The sentencing court also had before it a presentence report ("PSR"), and reports from Drs. Paul Bindelglas and George Dee. Libberton's father told the PSR investigator that while the crime was "uncharacteristic of his son's behavior," he "does not doubt that the defendant actually committed this crime and, in fact, believes he may have been the leader in planning the crime." While the PSR's social history explained that Libberton had moved frequently as a child, it reports

no childhood abuse. The PSR stated that Libberton had been treated by a psychiatrist for "emotional problems he experienced as an adolescent," and that he had never received psychological treatment that he alleged was promised to him by a state court.

Dr. Bindelglas described Libberton as "a young man from a broken home who seems to have some effeminate mannerisms but no overt homosexual activities." It was Bingelglas's opinion that "[a]lthough Mr. Libberton is sane legally, I do feel he has severe psychological problems." Moreover, Bindelglas stated that "I do not believe Mr. Libberton acted with premeditation. He is much too impulsive for that." Dr. Dee reported that Libberton suffered from chronic depression, and had "severe emotional problems." He further concluded that "[w]ithout intensive treatment he would be like a time bomb waiting to go off."

b. Evidence that Lim Could Have Discovered

Evidence that Lim could have discovered in the course of a proper investigation would have dramatically transformed the case for mitigation. In our view, the evidence that Lim failed to discover is sufficiently persuasive that, had it been presented to the sentencing judge, there is a reasonable probability that he would have imposed a different sentence.

First, Libberton presents evidence showing that the crime was the result of James's instigation and that Libberton was merely a follower. Lim had stated in his closing argument at sentencing that Libberton was merely a follower in murdering Maya, but the only

evidence supporting that statement was Henry's rather vague statement that Libberton was "more of a follower." That vague statement was directly contradicted by Libberton's own father's statement in the PSR that he believed his son "may have been a leader in planning the crime."

Daniel Severance explained in an affidavit presented to the federal habeas court that he had been with James on November 16, the day Maya was killed. He explained that "James was ... very emotionally upset on that date because his girlfriend had recently left him. He had even cried about her departure, which was very unusual for Mr. James." James was also "extremely violent as a result of drinking due to the situation involving his girlfriend." Severance recalled that, in the days immediately preceding Maya's murder, he and James cleaned James's gun after his girlfriend finally departed, and even practiced firing it outside the trailer. Severance further explained that "James also became very upset involving any situation with Martin Norton, who Mr. James looked at as a son." He believed that "Mr. James was in a very bizarre emotional state as a result of his girlfriend's departure," and that he "had no doubt ... that Mr. James intended to do exactly what he said he would do ..., which was kill the individual with Mr. Norton." While Severance did not know Libberton well, he believed Libberton "was simply at the wrong place at the wrong time while Mr. James did exactly what he indicated he was going to do which was to kill." Finally, Severance averred that he was never contacted by Lim, but could have been easily located in Phoenix.

This same portrait of James emerges from an affidavit submitted by his former girlfriend, Diana Hodge. She stated that after moving out of James's trailer she "feared for [her] life because of the things that Mr. James said and did." When she moved out of the trailer, she "solicited the help of two large black males to help [her] move." She explained that towards "the end of the move from the trailer, Mr. James arrived in a very intoxicated state and he was also very high on drugs. He was extremely upset and made the comment 'When I find you, I'll kill you.' He made the same threat later by telephone." Hodge further stated that she was

> convinced that Mr. James would have killed me or anyone else for revenge because he was so upset that I left. In my opinion, he was in a horrible state of mind after I left him and he had the ability to kill someone because of his deranged mind. I think Stephen James had the capacity to kill.

She stated that Lim "never made any attempt to contact me during the first one or two years after the incident. I was living in the Phoenix area and certainly could have been located had they made an attempt to do so."

Dan McIntosh could have further corroborated James's role as the leader and Libberton's role as a follower. McIntosh explained in an affidavit that "James borrowed[the] gun from a man who lived nearby" because "[h]e was upset because his girlfriend had moved out to live with two black men." He also recalled that James once showed him "Polaroid photographs of

gallows he had built," and that "he had hung his dog from the gallows." After being arrested James "telephoned [McIntosh] and threatened to kill [him] and[his] family if [he] testified against" James. Despite the fact that McIntosh testified in the guilt phase of trial, he was never contacted by Lim with regard to sentencing.

Libberton also seeks to rely on Norton's post-trial affidavit to support his argument that he was merely a follower. It is important to Libberton that he present evidence Lim could have used to impeach Norton, for the portrayal of Libberton as a coequal in Maya's murder was entirely the result of Norton's testimony. Norton was the only eyewitness other than James and Libberton. Norton testified that Libberton was not merely a follower, but an eager participant in the crime. As noted above, Norton signed this affidavit about ten years after the trial. It is unlikely that Lim, even if he had been diligent, could have obtained such an affidavit, or such testimony, at the time of sentencing. At the time of Libberton's sentencing phase trial, Norton had just been convicted and sentenced himself, and the contents of his affidavit directly contradict much of his testimony at trial. His plea bargain depended on his having provided truthful testimony at trial. We therefore do not rely on Norton's affidavit.

However, other evidence was readily available that Lim could have used to impeach Norton. Norton's juvenile record included evidence that could have seriously impeached his testimony. His intake summary at the Maricopa County Juvenile Court

Center noted that "[a]t times he will lapse into saying most anything that comes to his mind, or tell stories, in answer to a question, that are obviously not true. Also, he seems to feel very much threatened when the subject of homosexuality is brought up." Norton's psychological evaluation noted that he "has a very difficult time perceiving any situation in a matter-of-fact way. He has a very overpersonalized and at times distorted perception of the environment which makes it difficult for him to maintain any stability." The evaluation goes on to find "significant and marked identity and psychosexual confusion and once again, Martin attempts to deal with this through overcompensation and projection." Had this evidence been presented at trial and at the sentencing hearing, it would have seriously undermined Norton's portrayal of Libberton as a coequal participant with James in Maya's murder.

Second, Libberton presents evidence showing that he was seriously abused during his childhood. The Supreme Court has repeatedly held that evidence of childhood abuse is a relevant mitigating factor. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 535, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."); *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a

disadvantaged background ... may be less culpable than defendants who have no such excuse." (quotation marks omitted)). Libberton's mother and sister were available to testify, and could have painted a sympathetic portrait of Libberton. Lim had spoken to Libberton's mother, but he did not call her to testify at the sentencing hearing. In her affidavit, she described Libberton's father as abusive. She explained that Libberton's father "had a very hot temper and when he would get angry, he would fly into a rage." She recalled that after she and her husband divorced she "received a telephone call from Child Protective Services ... informing me that Steven and Larry had been dropped off there by their father. Dave had severely beaten the boys and taken them to the juvenile center stating that he[no] longer wanted them."

Libberton's sister, Susan Farias, corroborated and gave further details of Libberton's abuse by his father. She explained in her affidavit that their father "was physically abused as a child and in turn abused us." She explained that while "Larry" was apparently her father's favorite child when he was young, as he grew older "he was beaten more" than the other children. Their father "would take his belt, fold it in half and snap it a few times before he hit" his children. After Libberton's parents divorced, Libberton's step-father also abused him. Libberton's abusive childhood was further described by Helen Robichaux, a childhood friend of Libberton's. She recalled in an affidavit that Libberton's father "had a very violent temper and was a difficult man to get along with." She also "remember[ed] Larry coming to school after he had been punished. Sometimes he would still be bruised

from the punishment."

However, the only family member whose opinion was put before the sentencing court was Libberton's father. The same father who abused Libberton as a child was quoted in the PSR as saying not only that his son could have participated in such a murder, but that he was likely to have been the leader in the conspiracy. Libberton's mother and sister could have seriously undercut his father's opinion, but Lim failed to put them on the stand.

In sum, Lim failed to find and present extensive evidence that would have showed James's greater culpability in Maya's murder, would have showed Libberton's abusive childhood, and would have contradicted the very damaging evidence supplied by Libberton's father. We conclude that the failure to find and present this evidence was prejudicial. Lim's failures create a reasonable probability that, had the above-described evidence been presented to the sentencing judge, he would have imposed a lesser sentence. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Because Libberton has satisfied both *Strickland* prongs, we grant his petition with regard to sentencing.

Conclusion

Libberton's arguments as to the guilt phase of his trial all fail. Even if it is true that Martin Norton entered into an undisclosed deal with prosecutors before being interviewed by the prosecutor, this would not be material. Libberton has failed to establish that, had

the alleged oral deal been revealed to the judge, there would have been a reasonable probability of a different outcome. Because he cannot meet that standard of materiality, his arguments under *Brady*, *Giglio*, and *Napue* fail. We do not reach the merits of Libberton's *Tennard* argument, as it was not exhausted in state court.

However, we conclude that his counsel rendered unconstitutionally ineffective assistance with respect to sentencing.

We therefore AFFIRM the judgment of the district court with respect to all of Libberton's guilt-phase claims. However, we REVERSE the judgment of the district court and remand with instructions to grant the writ of habeas corpus with respect to sentencing. We instruct the district court to grant the state a reasonable amount of time in which to resentence Libberton. If the state chooses not to resentence, Libberton's sentence will automatically be converted to life in prison in accordance with Arizona law.

C.A.9 (Ariz.),2009.
Libberton v. Ryan
583 F.3d 1147, 09 Cal. Daily Op. Serv. 12,441

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APPENDIX B

United States District Court,
D. Arizona.
Laurence K. LIBBERTON, Petitioner,
v.
Dora B. SCHRIRO,[FN1] et al., Respondents.

FN1. Dora B. Schriro, Director of the Arizona Department of Corrections, is substituted pursuant to Fed.R.Civ.P. 25(d)(1).

No. CIV 97-1881-PHX-EHC.

Sept. 18, 2007.

Todd Edward Hale, Lewis & Roca LLP, Denise I. Young, Tucson, AZ, Jose A. Cardenas, Lewis & Roca LLP, Phoenix, AZ, for Petitioner.

Robert John Gorman, Office of the Attorney General, Tucson, AZ, for Respondents.

MEMORANDUM OF DECISION AND ORDER

EARL H. CARROLL, United States District Judge.

Laurence K. Libberton (Petitioner) has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (Dkt.1.) [FN2] In this order, the Court reviews the merits of Petitioner's remaining claims and his requests for an evidentiary hearing and expansion of the record.

FN2. "Dkt." refers to the documents in the Court's file. "ROA" refers to the record on direct appeal (CR 82-5701-AP). "ROA-PCR" refers to the record from the postconviction proceedings (CR 84-0310-PC; CR 89-0079-PC; and CR 97-0180-PC). "RT" refers to the reporter's transcript. The state record was filed on May 8, 2000, and supplemented on June 27, 2007. (Dkts.43, 91.)

BACKGROUND

The Arizona Supreme Court summarized the facts surrounding the crime and Petitioner's arrest as follows:

> In the early morning hours of November 17, 1981, the victim, Juan Maya, picked up a hitchhiker, Martin Norton. Norton, a 14-year-old, lived with a friend, Steven James, in a mobile home trailer located in Phoenix. Maya drove to the trailer and, according to Norton, made homosexual advances. Norton resisted and told Maya he should go in the trailer because there was a homosexual there who could satisfy Maya's desires. Maya entered the trailer, which was occupied at the time by James and the [Petitioner], Libberton. Norton told James that Maya was gay and to get rid of him. James then kicked Maya in the crotch, and Maya left the trailer and ran. James and [Petitioner] pursued Maya and brought him back to the trailer. Norton testified that Maya's nose and mouth were bleeding when he was brought back to the trailer.

Once again in the trailer, Norton, James, and [Petitioner] took turns hitting Maya in the face. Maya pleaded with them to take his car and credit cards and quit hitting him. James had a gun in his hand and took Maya's wallet. From the wallet, [Petitioner] obtained the title to Maya's car, and forced Maya to sign the title over to [Petitioner]. James took Maya's bracelet and ring. [Petitioner] put on Maya's belt, which had Maya's name engraved on the back, and said, "[n]ow that I own Juan Maya's car I might as well be Juan Maya."

The three assailants then discussed, in Maya's presence, what to do with Maya. James said, "[t]he only thing we can do is kill him." [Petitioner] agreed. Next, James suggested the three could hide the body in a mine shaft on his parents' property in Salome. [Petitioner] agreed, and at gunpoint forced Maya into Maya's car. [Petitioner] kept the gun pointed at Maya all the way to Salome, approximately a two-hour drive from the trailer. On the way, James bought gas and cigarettes with one of Maya's credit cards. Later, along the highway to Salome, a police officer stopped the car for speeding. James, the driver, got out of the car and talked with the officer. [Petitioner] threatened to shoot Maya if he said anything. James got back in the car and the group proceeded to Salome.

The group arrived at James' parents' property shortly before daybreak. [Petitioner] handed the gun to James who ordered Maya to walk up the side of a small mountain to the mine shaft. Maya requested

and was allowed to smoke a cigarette. The assailants stood by Maya, allowing him to finish his cigarette, before beginning the final assault. When Maya finished his cigarette, James ordered Maya to step to the shaft, a hole about five feet in diameter with a beam across the top. Maya screamed "[d]on't kill me." James fired at Maya twice from less than five feet. (Only sparks and no bullets came out of the gun because, as established at trial, the gun was filled with debris.) Maya ran at James, grabbed the gun, struggled with James, and fell to the ground. [Petitioner] grabbed a five-pound rock and began beating Maya on the back of the head and shoulders with it. Maya was still struggling with James for the gun. Norton handed [Petitioner] a board, with which [Petitioner] struck Maya on the back, forcing Maya to let go of the gun. James then shot in the direction of Maya's head. As before, only sparks came out of the gun. Maya was still conscious, making "gurgling sounds," and moaning. [Petitioner] grabbed the gun from James and fired it at Maya's head. Again, the gun malfunctioned. Maya was still not dead, so all three assailants picked up large rocks and slammed them on the back of Maya's head as Maya lay face down. After about five blows Maya lay unconscious. [Petitioner] and James dragged Maya to the mine shaft and threw him in.

Back in the car [Petitioner] and James told Norton that if he told anyone they would kill him. The three then returned to Phoenix. James told Norton to clean the trailer and remove Maya's blood from the couch. That morning [Petitioner] and James picked up David McIntosh in Maya's car. The three assailants

> drove McIntosh around. [Petitioner] bought some shoes with one of Maya's credit cards. At noon the three assailants were captured when [Petitioner] attempted to get a cash advance of $20 on Maya's MasterCard.

State v. Libberton, 141 Ariz. 132, 135-36, 685 P.2d 1284, 1287-88 (1984).

On June 30, 1982, a jury found Petitioner guilty of first degree murder, aggravated robbery, kidnapping, and theft. The trial court sentenced Petitioner to death for the murder conviction, and consecutive prison terms of fifteen years for aggravated robbery, twenty-one years for kidnapping, and five years for theft. The Arizona Supreme Court affirmed Petitioner's convictions and sentences on appeal. *Id.*

On July 26, 1984, Petitioner filed a petition for post-conviction relief ("PCR"), pursuant to Arizona Rule of Criminal Procedure 32. The Rule 32 court dismissed the PCR petition on October 16, 1984. The Arizona Supreme Court denied the petition for review.

On January 31, 1985, Petitioner filed a petition for writ of habeas corpus in this Court. The federal proceedings were stayed on April 7, 1985, pending exhaustion of Petitioner's claim of ineffective assistance of appellate counsel. On April 26, 1985, Petitioner filed a second PCR petition. The Rule 32 court summarily dismissed the second PCR proceeding on March 13, 1986. On December 1, 1986, Petitioner filed an amended habeas petition in this Court. A second stay of federal proceedings was granted for

failure to exhaust state remedies.

On September 14, 1987, Petitioner filed a third PCR petition. The Rule 32 court summarily dismissed the proceeding on February 10, 1988, and the Arizona Supreme Court denied the petition for review. On September 8, 1991, Petitioner filed a second amended habeas petition in this Court. On January 15, 1993, the parties stipulated to the filing of a third amended habeas petition. On February 10, 1994, based on Petitioner's allegations of newly discovered evidence, this Court dismissed the third amended petition, without prejudice, to allow Petitioner to return to state court to exhaust the claim.

On September 12, 1994, Petitioner filed a fourth PCR petition in state court. The Rule 32 court dismissed the proceeding, and on June 24, 1997, the Arizona Supreme Court denied the petition for review.

On September 9, 1997, Petitioner filed a new petition for writ of habeas corpus, which he amended on February 17, 1998. The amended petition raised forty-two claims for relief. (Dkt.13.)

On July 17, 2000, the Court filed an order finding Claims 27 and 42 (in part) procedurally barred. (Dkt. 45 at 1.) The Court also found Claims 28-30, 37 and 42 (in part) meritless. The Court stated that Claims 1-26, 31-36, and 38-41 would be subject to review on the merits and ordered further briefing. (*Id.* at 1, 18.) The briefing is now complete. (Dkts. 65, 70, and 83.)

AEDPA STANDARD FOR HABEAS RELIEF

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "adjudicated on the merits" refers to a decision resolving a party's claim which is based on the substance of the claim rather than on a procedural or other non-substantive ground. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir.2004). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir.2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir.2005).

"The threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the

"clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 127 S.Ct. 649 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir.2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381. Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark*, 331 F.3d at 1069.

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause ."

Williams, 529 U.S. at 406; *see Lambert*, 393 F.3d at 974.

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. In order for a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S.Ct. 2317, 2325 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.2004). In considering a challenge under 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this

presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller-El II*, 545 U.S. at 240, 125 S.Ct. at 2325. However, it is only the state court's factual findings, not its ultimate decision, that are subject to 2254(e)(1)'s presumption of correctness. *Miller-El I*, 537 U.S. at 341-42. ("The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.").

As the Ninth Circuit has noted, application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir.2003); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir.2002); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir.2000). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. *Pirtle*, 313 F.3d at 1167 (citing *Delgado*, 223 F.3d at 981-82); *see also Himes*, 336 F.3d at 853. Only when a state court did not decide the merits of a properly raised claim will the claim be reviewed de novo, because in that circumstance "there is no state court decision on [the] issue to which to accord deference." *Pirtle*, 313 F.3d at 1167; *see also Menendez v. Terhune*, 422 F.3d 1012, 1025-26 (9th Cir.2005); *Nulph v. Cook*, 333 F.3d 1052, 1056-57 (9th Cir.2003).

DISCUSSION

I. Applicability of the AEDPA

As a threshold matter, Petitioner argues that his operative amended petition is not governed by the strictures of the AEDPA because, although filed in September 1997, the amended petition effectively relates back to an earlier habeas petition, filed prior to the AEDPA's effective date of April 24, 1996. This earlier habeas proceeding was dismissed by the Court in 1994 to permit Petitioner to file a fourth PCR petition in state court.

Petitioner asserts that the stipulation for dismissal of his prior habeas petition was effectively a stay rather than a dismissal and, therefore, the new amended petition related back to a pre-AEDPA petition. (*See* Dkt. 83 at 3-7.) Petitioner raised this issue in his reply, and Respondents have not sought to respond.

In dismissing Petitioner's previous federal habeas proceeding on February 10, 1994, the Court stated that it did so pursuant to a stipulation from the parties for dismissal without prejudice. (*See Libberton v. Lewis* (*Libberton I*), CIV 85-249-PHX-RGS, Dkt. 156; *see also* Dkt. 14, Ex. 2.) The stipulation filed in *Libberton I* requested dismissal without prejudice rather than staying and abeying and cited as precedent the Court's order of January 27, 1994, in the case involving Petitioner's accomplice in the crime, Steven James. In James's case, the Court ordered dismissal without prejudice, declining to stay and abey the proceedings. (Dkt. 14, Ex. 1 at 20.) Because Petitioner's prior case

was dismissed and the current habeas proceeding was filed after the effective date of the AEDPA, it is subject to the Act's statutory provisions. *See* *Mancuso v. Herbert*, 166 F.3d 97, 101 (2d Cir.1999) ("We conclude that the AEDPA applies to a habeas petition filed after AEDPA's effective date, regardless of when the petitioner filed his or her initial petition and regardless of the grounds for dismissal of such earlier petition."); *see also* *Henry v. Lundgren*, 164 F.3d 1240, 1241 (9th Cir.1999) (holding that a second habeas petition does not relate back to the date of the filing of the initial petition under Rule 15(c)(2) of the Federal Rules of Civil Procedure where "the district court did not expressly or impliedly retain jurisdiction over [the petitioner's] original petition when the court dismissed for failure to exhaust.")

II. Merits Analysis

Petitioner exhausted all of his claims, with the exception of Claims 1-3 and 6, by raising them in his 1987 PCR petition. The state court summarily rejected all of the claims in that petition, stating that Petitioner "has failed to raise any colorable claim whatsoever," and "no material issue of fact or law exists which would entitle [him] to relief." (ROA-PCR, Vol. 1 of 1, ME 2/10/88 at 1.) The Arizona Supreme Court denied review without comment. Because the PCR court provided no rationale for its determination, on habeas review this Court will review the record independently to assess whether the court's decision denying relief on these claims was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167. The state court decisions regarding

Claims 1-3 and 6 are set forth within the discussion of those claims, and reviewed under 28 U.S.C. § 2254(d).

A. CLAIMS IN MERITS BRIEF (CLAIMS 1-3, 4, 6-7, 9, 11, 16, 20-22, 24, 36 AND 41)

Claims 1 and 2-State Failed to Disclose Leniency Promise to Norton and Failed to Correct Norton's False Testimony That He Received No Deals

In Claim 1, Petitioner asserts the State violated his right to due process of law and a fair trial guaranteed by the Fourteenth Amendment when the State failed to disclose that it had promised Norton something of value-namely, to try him as a juvenile-in return for his December 29, 1981 statement to prosecutors. (Dkt. 13 at 34; *see also* Dkt. 65 at 25-27.) In Claim 2, Petitioner contends that the State violated his federal due process rights when it failed to correct Norton's false testimony that there was no deal between himself and the State in return for his December statement. (Dkt. 13 at 34; *see also* Dkt. 65 at 27-29.)

Background

Trial Testimony

Martin Norton was a fourteen-year-old friend of Petitioner at the time of the murder. He admitted his own involvement in the killing of Juan Maya, and was arrested along with Petitioner several hours after Maya's murder. Norton was the chief witness against Petitioner at trial. He testified that Petitioner participated in the beating and kidnapping of the

victim at Steven James's trailer on the evening of November 16, 1981. He further testified that Petitioner forced Maya to sign the title to Maya's car over to Petitioner and that Petitioner personally forced Maya into the car and held a gun on Maya during the drive up to Salome, Arizona. (*See* RT 6/28/82 at 13-16, 20-22, 24, 27-31.)

Norton testified that when they arrived at the murder scene near Salome, Petitioner and James forced Maya out of the car. He testified that they both attempted to shoot Maya (the gun misfired each time), then bludgeoned him with rocks and threw his body into a mine shaft. Norton stated that he also participated in beating Maya at the trailer and bludgeoning him to death at the murder scene. He indicated that both Petitioner and James threatened to kill him if he told anyone what they did to Maya. (*See* RT 6/28/82 at 37-41.) This testimony was substantially consistent with his December 29 statement to authorities. (*See* Dkt. 14 at Ex. 15.)

Norton admitted on direct examination that he was not truthful in his initial pre-trial interviews with police. He also stated that he was offered no deal in return for any of his pre-trial statements to police and/or prosecutors, including his December 29 statement:

> [PROSECUTION]: Were you questioned by police [when first detained in the parking lot of Valley National Bank on November 17, 1981]?
>
> [NORTON]: Yes, I was.

[PROSECUTION]: Did you tell them the truth?

[NORTON]: No.

[PROSECUTION]: Why?

[NORTON]: Because I was scared.

...

[PROSECUTION]: ... were you picked up again and questioned?

[NORTON]: Yes.

[PROSECUTION]: By Detective Davis?

[NORTON]: Yes.

[PROSECUTION]: Did you tell him everything that had happened at that time?

[NORTON]: No, I didn't.

[PROSECUTION]: And why?

[NORTON]: I was scared.

[PROSECUTION]: Then you were interviewed again by Detective Hackworth; weren't you?

[NORTON]: Yes.

...

[PROSECUTION]: When you were interviewed at Durango by Detective Hackworth [on November 26, 1981], did he promise you anything?

[NORTON]: No, he didn't.

[PROSECUTION]: At that point you knew you were being charged with murder, robbery, kidnapping and theft-

[NORTON]: Yes.

...

[PROSECUTION]: Did you agree to talk with Detective Hackworth?

[NORTON]: Yes, I did.

[PROSECUTION]: And you told him what happened to Juan Maya at that point?

[NORTON]: Most of it.

[PROSECUTION]: Did you admit your part in the crimes?

[NORTON]: No.

[PROSECUTION]: Not all of it; is that correct?

[NORTON]: Yes.

[PROSECUTION]: Now, when you talked to Detective Hackworth, did you know whether or not you would be treated as a juvenile or adult in prosecution?

[NORTON]: No.

[PROSECUTION]: Did you indicate that you would testify against Libberton and Steven James?

[NORTON]: No.

[PROSECUTION]: Now, subsequently you were-you had an attorney and you were interviewed by me [on December 29, 1981]; is that correct-

[NORTON]: Yes.

[PROSECUTION]:-with Detective Davis?

[NORTON]: Yes.

[PROSECUTION]: You weren't offered any plea agreements at that time; were you?

[NORTON]: No.

[PROSECUTION]: You were charged with first degree murder, kidnapping, robbery and theft; correct?

[NORTON]: Yes.

[PROSECUTION]: You were told that I wanted you

to tell the truth?

[NORTON]: Yes.

[PROSECUTION]: And did you talk to me?

[NORTON]: Yes, I did.

[PROSECUTION]: Did you tell me the truth?

[NORTON]: Yes, I did.

[PROSECUTION]: Did you tell me what you told the jury here today?

[NORTON]: Yes, I have

(RT 6/28/82 at 49-53.)

Petitioner acknowledged at trial that he subsequently entered into a plea agreement with the State, which was admitted at trial as exhibit 149. (RT 6/28/82 at 53-54.) The plea agreement provided that in return for admitting guilt to first degree murder, kidnapping, armed robbery, and receiving something of value through fraudulent use of a credit card, the State agreed to try and sentence Norton as a juvenile. (Dkt.14, Ex. 17.) The plea agreement also contained the following "consistency" clause:

(1) Martin David Norton agrees to testify fully and truthfully in any proceedings determined to be necessary by the State of Arizona regarding the victim Juan Maya and/or in any criminal prosecution

> of Lawrence Keith Libberton or Steven Craig James. On December 29, 1981, Martin David Norton provided information to Deputy Maricopa County Attorney Myrna Parker and represented that information to be true. *If Martin David Norton's testimony is not substantially consistent with the information that he provided in the December 29, 1981 interview, the State of Arizona shall have the option of withdrawing from this agreement and the agreement shall be void.*

(*Id.*) (emphases added).

On cross-examination, defense counsel challenged Norton's credibility by attacking the motive for his testimony, in particular, whether his testimony against Petitioner was prompted by a favorable plea which allowed him to be prosecuted as a juvenile and serve just three years for his role in the murder, robbery, and kidnapping of Maya:

> [COUNSEL]: You're now 15-years old Mr. Norton?
>
> [NORTON]: Yes.
>
> ...
>
> [COUNSEL]: You'll be out age 18; won't you?
>
> [NORTON]: Yes.
>
> [COUNSEL]: In other words, you're going to do about three years?

[NORTON]: Yes.

[COUNSEL]: Is that the reason you agreed to testify?

[NORTON]: No.

[COUNSEL]: Would you have agreed to testify had they prosecuted you as an adult?

[NORTON]: Yes.

[COUNSEL]: And charged you with first degree murder?

[NORTON]: Yes.

[COUNSEL]: And face a life sentence?

[NORTON]: Yes.

[COUNSEL]: You would still come here and testify?

[NORTON]: Yes, I would.

(RT 6/28/82 at 55.)

Defense counsel returned to this topic later:

[COUNSEL]: Did you have an attorney before you talked to Detective Hackworth?

...

[NORTON]: I probably did.

[COUNSEL]: You were being held as a juvenile at that time; were you not?

[NORTON]: Yes.

[COUNSEL]: Did you know about the difference between juvenile prosecution and adult prosecution?

[NORTON]: A little bit.

[COUNSEL]: What do you know about the difference between juvenile prosecution and adult prosecution?

[NORTON]: Adults get hard time.

[COUNSEL]: If you were prosecuted as an adult you could be sent to prison; couldn't you?

[NORTON]: Yes.

[COUNSEL]: Do you know what the penalty for murder in the first degree is?

[NORTON]: Life.

[COUNSEL]: Is there an alternative to life?

[NORTON]: The death penalty.

...

[COUNSEL]: And if you were prosecuted as an adult you could get one or the other; is that right?

[NORTON]: Yes.

[COUNSEL]: If you were prosecuted as a juvenile what do you get?

[NORTON]: Until I'm 18.

...

[COUNSEL]: In other words, your maximum time that you would do is three years; is that correct?

[NORTON]: Yes.

[COUNSEL]: There is a definite advantage to being prosecuted as a juvenile; is that true?

[NORTON]: Yes.

[COUNSEL]: So it's to your benefit to be prosecuted as a juvenile; isn't it?

[NORTON]: Yes.

[COUNSEL]: Does the fact that you were being prosecuted as a juvenile affect your story in any way?

[NORTON]: No.

[COUNSEL]: Are you certain of that?

[NORTON]: Yes.

[COUNSEL]: You have no reason to tell anything that isn't true; is that right?

[NORTON]: Yes.

[COUNSEL]: And you agreed to cooperate with the police not knowing that you would get a deal?

[NORTON]: Yes.

[COUNSEL]: Did you feel you would get a deal if you cooperated with police?

[NORTON]: No.

[COUNSEL]: You didn't feel that you were going to get a deal?

[NORTON]: No.

[COUNSEL]: You voluntarily came out knowing that you probably would be prosecuted as an adult?

[NORTON]: Yes.

(RT 6/29/82 at 178-80.)

PCR Proceedings

Petitioner raised Claims 1 and 2 in his 1994 PCR petition. To support his contention that the State failed to disclose that a deal had been made to try Norton as a juvenile in return for his December 29, 1981 statement against Petitioner (Claim 1), as well as his

claim that the State failed to correct Norton's trial testimony that he had not received any deal for that statement (Claim 2), Petitioner included a 1993 affidavit from Norton's pre-trial attorney, Robert Wertsching. Wertsching was appointed to represent Norton on December 4, 1981. (ROA-PCR, Vol. 6, State's Exs. in Resp. to 1994 PCR pet., Ex. H.) In his affidavit, Wertsching attests, in pertinent part:

> 2) As counsel for a minor charged with murder, it was essential for me to make all reasonable efforts to assure that my client would not be remanded to adult court. The prosecution had made a formal transfer request on the petition filed against my client.
>
> 3) On my client's behalf, I had at least two conversations with the head prosecutor of the juvenile division of the Maricopa County Attorney's office on the subject of whether the County Attorney would agree not to seek transfer of Mr. Norton to adult court.
>
> ...
>
> 5) At some point in time the head of the juvenile division indicated orally that if Mr. Norton would give a full and accurate statement to the County Attorney and would testify consistently with that statement at the trial of the adults who participated in the homicide offense, the County Attorney would not seek to have my client transferred to adult court.
>
> 6) Thereafter, in expectation that these contingencies would be met by debriefing my client, I

was present at the jail when my client gave a statement to Ms. Parker, Deputy County Attorney [and the prosecutor in Petitioner's case], in the presence of an investigator.

7) At the time of the formal jail interview with Ms. Parker, my client and I expected that if my client was truthful in the debriefing and cooperated fully with the prosecution of the adult defendants, he would not be remanded to adult court. I have no information whether Ms. Parker was aware of my oral communications with the head of the juvenile division.

8) Subsequent to the formal jail interview with Ms. Parker, my client and I signed a formal written agreement that conformed with the oral understanding I had previously reached with the juvenile division head.

(Dkt.14, Ex. 16.)

To counter Wertsching's affidavit, Respondents submitted affidavits from the prosecuting attorney, Myrna Parker, as well as Warren K. Smoot, Chief of the Juvenile Division of the Maricopa County Attorney's office during the time in question, and William F. Molner, an attorney in the juvenile division. (ROA-PCR, Vol. 6, State's Exs. in Resp. to 1994 PCR Pet., Exs. B, C, D.) Ms. Parker flatly denies that any deal was made with Norton in return for his December 29 statement. She attests, "[o]nly after I heard Norton's statement of December 29, 1981, did I determine whether the State would be willing to enter

into a plea agreement with him." (*Id.*, Ex. B.) Parker further attests that no one at the juvenile division spoke to her about a deal with Norton. (*Id.*) Likewise, both Smoot and Molner deny making any deal with Norton in return for his December 29 statement and/or his testimony against Petitioner. (*See id.*, Exs. C, D.)

In denying relief, the PCR court stated:

> The Court finds it unnecessary to weigh the credibility of these competing affidavits because in two other respects, the State should prevail. First, the Court finds that the disclosure of the alleged promise probably would not have changed the jury's verdict. As the State's response recites, the jury heard other evidence strongly circumstantial of Defendant's guilt. Second, Norton gave a consensual statement to the police on November 16, 1981,[FN3] which fully incriminated Defendant before Wertsching was appointed to represent Norton and before Wertsching could have been promised anything by a member of the prosecutor's office. Also, because the November 16, 1981, statement would have been admissible to counteract the effect of a claim by Defendant that the December 29, 1981, statement was incredible because of a promise to Wertsching, it is improbable the verdict would have been different.
>
> > FN3. The interview in question with Detective Hackworth took place on November 26, 1981, not November 16, 1981. (*See* Dkt. 14, Ex. 14.) The crimes against Maya did not take place until the late evening/early morning hours of

November 16/17, 1981.

(ROA-PCR, Vol. 1 of 1, ME 11/21/96 at 9.) The Arizona Supreme Court denied review without comment.

Merits

Petitioner argues that the PCR court's determination is contrary to the holding of the United States Supreme Court in both *Giglio v.. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959), and that the facts in this case are legally indistinguishable from the facts in those cases.

Petitioner cites *Giglio* in support of Claim 1. In *Giglio,* the Court described a witness, Taliento, as a "coconspirator in the offense and the only witness linking [Giglio] with the crime." 405 U.S. at 151. During cross-examination, Taliento denied he was promised a deal exempting him from prosecution if he testified against Giglio. On appeal, however, an Assistant United States Attorney averred in an affidavit that he told Taliento that if he testified against Giglio before the grand jury and at trial, he would not be prosecuted. *Id.* at 152. This evidence was not disclosed to either the court or jurors at trial.

The Supreme Court reversed Giglio's conviction. The Court noted that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady*] rule" and due process requires a new trial. *Giglio,* 405 U.S. at 154 (quoting *Napue.* 360 U.S. at 269). However, the failure

to disclose does not "automatically require a new trial" unless "the false testimony could ... in any reasonable likelihood have affected the judgement of the jury." *Id.* (quoting *Napue*, 360 U.S. at 271). Applying these principles, the Court determined that, because the case against Giglio depended almost entirely on Taliento's testimony, "evidence of any understanding or agreement as to future prosecution would be relevant to his credibility and the jury was entitled to know it." *Giglio*, 405 U.S. at 155.

To support his allegation in Claim 2 that the prosecution violated due process when it failed to correct Norton's false testimony that there was no deal, Petitioner cites *Napue v. Illinois*, 360 U.S. 264 (1959). Hamer, Napue's accomplice in a murder, testified against Napue at trial and stated that he had received nothing in return for his testimony. *Id.* at 265. After Napue was convicted, the attorney who prosecuted the case filed a petition on Hamer's behalf stating "he had promised Hamer that if he would testify against Napue, 'a recommendation for a reduction of his (Hamer's) sentence would be made and, if possible effectuated.' " [FN4] *Id.* at 266. Napue eventually learned of the prosecutor's action on behalf of Hamer and unsuccessfully sought relief in the Illinois state courts.

> FN4. Hamer had also been convicted of the same murder Napue was involved in and was sentenced to 199 years in prison, the same sentence Napue received after he was convicted. *Napue*, 360 U.S. at 265-66.

The Supreme Court reversed, stating the general

principle "that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Napue, 360 U.S. at 269. The Court further stated, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id* . The Court characterized the evidence against Napue as "consist[ing] largely of Hamer's testimony," and noted that Hamer "clearly testified that no one offered to help him except an unidentified lawyer from the public defender's office." *Id.* at 266, 270. The Court also determined that:

> [h]ad the jury been apprised of the true facts ... it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration....

Id. at 270. The Supreme Court applied a prejudice standard, noting a new trial is not required if the false testimony could not in reasonable likelihood have affected the verdict. *Id.* at 271. The Court concluded that Hamer's false testimony "may have had an effect on the outcome of the trial." *Id.* at 272.

This Court concludes that the holdings in *Giglio* and *Napue* do not entitled Petitioner to habeas relief. First, although the state court cited neither decision in rejecting Petitioner's claims, its analysis is consistent

with and not contrary to the governing principles set forth in those cases. A decision is contrary to Supreme Court law only if (1) it arrives at an opposite conclusion on a question of law or (2) arrives at a different result when faced with materially identical facts. *Williams*, 529 U.S. at 405. The PCR court held that the allegedly withheld information about a deal and Petitioner's false denial of same "probably would not have changed the jury's verdict." (ROA-PCR, Vol. 1 of 1, ME 11/21/96 at 9.) This is consistent with the Supreme Court standard that a petitioner is not entitled to relief unless there is a "reasonable likelihood" that the non-disclosure impacted the verdict. *Giglio*, 405 U.S. at 154; *Napue*, 361 U.S. at 271. Additionally, the facts of *Giglio* and *Napue* are not materially identical because, in Petitioner's case, Norton's plea agreement with the government was presented to the jury.

Second, the state court's decision was not an unreasonable application of *Giglio* or *Napue*. The Court agrees with the PCR court that it is not necessary to resolve whether Wertsching or the State's attorneys were telling the truth. Even accepting Wertsching's claim that juvenile division attorneys orally promised Norton a favorable plea for his December 29, 1981 statement, and that the State failed to disclose the deal and failed to correct Norton's testimony denying its existence, Petitioner cannot show a "reasonable likelihood" that disclosure of Wertsching's information to the jury would have resulted in Petitioner's acquittal. *Giglio*, 405 U.S. at 154; *see also* *Napue*, 360 U.S. at 271-72.

Unlike the situation in either *Giglio* and *Napue*, the

jury was aware of the accomplice's plea agreement, which was admitted into evidence at trial. (RT 6/28/82 at 53-54; *see also* Dkt. 14 at Ex. 17.) The agreement informed the jury that Norton's trial as a juvenile was conditioned on testimony against Petitioner "substantially consistent" with his December 29 statement. On cross-examination, defense counsel vigorously attacked Norton's credibility, highlighting the benefit he would receive if tried as a juvenile. (*See* RT 6/28/82 at 55; 6/29/82 at 178-80.) Thus, in addition to knowing that Norton was an active participant and accomplice in Maya's murder, the jury knew that he had executed a plea agreement which contained the essence of the deal Petitioner claims was "undisclosed;" namely, that the State agreed to try Norton as a juvenile (with a sentence lasting no more than three years) in return for a truthful statement on December 29, 1981, and testimony consistent therewith at Petitioner's trial. The jurors were therefore aware of a deal between Norton and the State in return for his testimony. Nevertheless, they credited his testimony and convicted Petitioner.

Moreover, prior to any contact between his attorney and juvenile prosecutors, Norton recounted to police essentially the same facts regarding Petitioner's involvement in the killing of Juan Maya as those provided in his December statement and trial testimony. Detective Jack Hackworth's report of a November 26, 1981 interview with Norton recounts that Norton told him he "lured" Maya to James's trailer in the late evening of November 16, 1981. (Dkt. 14, Ex. 14 at 2.) He further recounts that Norton stated that upon his arrival at James's trailer he told James

and Petitioner that Maya was a "queer" and all three of them then proceeded to savagely beat Maya. Hackworth recounts that Norton stated they then forced Maya into his car and drove to the murder scene in Salome with Petitioner holding a gun on Maya for the entire duration (several hours), and that Petitioner and James discussed killing Maya. Further, Norton told him Petitioner agreed with James they had to kill Maya so he wouldn't "snitch us off." (*Id.*) Hackworth also recounts that Norton told him that once they got to the abandoned mine shaft, Maya was forced out of the car and both James and Petitioner attempted to shoot Maya but failed because the gun misfired. James, Petitioner, and Norton then proceeded to bludgeon Maya to death with rocks. James and Petitioner dragged Maya's lifeless body to the entrance of the mine shaft and threw it in. (*Id.* at 3.) The Court agrees with the PCR court's conclusion that Hackworth's report, and any supporting testimony, could have effectively countered a claim by Petitioner that Norton's December 29, 1981 statement and trial testimony were not credible because they were prompted by a favorable plea deal.

For these reasons, the Court does not believe Petitioner can establish a "reasonable likelihood" that the information in Wertsching's affidavit, if disclosed to the jury, would have changed the verdict. As a result, the PCR court's denial of relief on Claim 1 was not contrary to or an unreasonable application of the principles enunciated in *Giglio* and *Napue*.

In addition, with respect to Claim 2 (alleging the State failed to correct false testimony by Norton that there

was no deal in return for his statement), Wertsching's affidavit does not contradict Prosecutor Myrna Parker's claim that she made no deal with Norton or his attorney prior to his December 29 statement, or her claim she was unaware of any oral deal offered by her office. (*See* ROA-PCR, Vol. 6, State's Exs. in Resp. to 1994 PCR Pet., Ex. B at 1.) Wertsching specifically states, "I have no information whether Ms. Parker was aware of my oral communications with the head of the juvenile division." (Dkt. 14, Ex. 16 at 2, ¶ 7.) Thus, the Wertsching affidavit does not support Petitioner's claim that the prosecutor knowingly permitted Petitioner to testify falsely. *See* *Napue*, 360 U.S. at 269. Additionally, as discussed above, Petitioner cannot establish prejudice. In sum, the PCR court's denial of relief on Claim 2 was not contrary to or an unreasonable application of the principles enunciated in *Giglio* and *Napue*.

Claims 1 and 2 will be denied.

Claim 3-Consistency Clause of Norton Plea Agreement

Petitioner asserts that Martin Norton's trial testimony, pursuant to a plea agreement containing a "consistency clause," denied him a fair trial and due process of law. (Dkt. 13 at 34-35; Dkt. 65 at 23-25; Dkt. 83 at 51-52.) This claim was raised in Petitioner's 1994 PCR petition (ROA-PCR, Vol. 7, Reply in Supp. of Rule 32 Pet. at 1-6), and denied on the merits (ROA-PCR, Vol. 1 of 1, ME 11/21/96 at 6-8).[FN5] The Arizona Supreme Court denied review without comment. To the extent Petitioner is reiterating the arguments of Claims 1 and 2 (*see* Dkt. 65 at 22), those issues are without merit for the

reasons discussed above.

> FN5. Petitioner first raised this claim in his third PCR petition filed in 1987. (Dkt. 26, Attach. at 29-30.) The 1987 PCR court denied relief in summary fashion. (ROA-PCR, Vol. 1 of 1, ME 2/10/88 at 1.) Petitioner raised the claim again in his 1994 PCR petition arguing a change in the law supported reconsideration.

Petitioner does not cite (*see* Dkt. 65 at 23-25; Dkt. 83 at 51-52), and the Court has not identified, any Supreme Court or federal law holding that testimony by accomplice witnesses pursuant to consistency clauses in plea agreements violates the Due Process Clause of the Fourteenth Amendment. Because there is no clearly established Supreme Court law holding that accomplice testimony predicated on "consistency clause" provisions in plea agreements violates federal due process under the Fourteenth Amendment, Petitioner cannot obtain habeas relief on this claim. *Musladin*, 127 S.Ct. at 654 (denying habeas relief in absence of clearly established federal law); *Williams*, 529 U.S. at 381 (noting that habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner); 28 U.S.C. § 2254(d)(1).

In bringing this claim, Petitioner appears to be seeking relief on a state law issue, which is not reviewable by this Court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Additionally, he is not entitled to relief based on the state law he cites. When he raised this claim in his fourth PCR petition, Petitioner argued that it was

appropriate for a successive PCR petition because *State v. Fisher*, 176 Ariz. 69, 859 P.2d 179 (1993), constituted a change in the law that he contended should apply retroactively. (ROA-PCR, Vol. 7, Reply in Supp. of Rule 32 Pet. at 1-6.) In *Fisher*, the Arizona Supreme Court determined that " 'consistency provisions' in plea agreements are unenforceable" because they "undermine the reliability and fairness of the trial and plea bargaining processes and taint the truth-seeking function of the courts by placing undue pressure on witnesses to stick with one version of the facts regardless of its truthfulness." 176 Ariz. at 73, 74, 859 P.2d at 183, 184. The PCR court held that *Fisher* could not be applied retroactively; therefore, consistency clauses were legal in Arizona prior to *Fisher*. (ROA-PCR, Vol. 1 of 1, ME 11/21/96 at 6-8.) The Arizona Supreme Court summarily denied review. Petitioner does not refute the PCR court's statement that consistency clauses in plea agreements were legal in Arizona at the time he was tried.[FN6] Thus, even if a state prohibition on consistency clauses could violate federal due process, it did not do so here. Petitioner is not entitled to relief on Claim 3.

> FN6. The Court disagrees that *Fisher* determined consistency clauses in plea agreements violate federal due process. In fact, the court avoided this question altogether, holding simply that such provisions are "unenforceable" under Arizona law. *See Fisher*, 176 Ariz. at 73, 859 P.2d at 183. Regardless, under the AEDPA, there must be clearly established Supreme Court law on point for Petitioner to obtain relief. *See Musladin*, 127

S.Ct. at 654; *Williams*, 529 U.S. at 381.

Claims 4 and 16-Petitioner's Right to Remain Silent

In Claim 4, Petitioner asserts that his right to remain silent under the Fifth, Sixth, and Fourteenth Amendments was violated when police detectives questioned him after he told them he did not wish to answer questions. (*See* Dkt. 13 at 35.) In Claim 16, Petitioner asserts these constitutional rights were again violated when the prosecutor commented during her closing argument that Petitioner failed to deny involvement in Maya's murder to the police. (*Id.* at 38.)

Petitioner contends that he made it clear to officers after his arrest that he did not want to answer questions. He asserts that the officers nevertheless continued to question him and, as result, he "eventually made incriminating statements on which the State relied at trial." (Dkt. 83 at 54.) He contends that any statements made during these interrogations "were involuntary and should have been inadmissible" because he told officers he did not want to answer questions. (Dkt. 13 at 35; Dkt. 83 at 54.)

Suppression Hearing in State Court

Just prior to trial, the state court held a suppression hearing to consider whether the statements made by Petitioner during post-arrest interrogations on November 17 and 18, 1981, were voluntary. Detective Thomas Neus and Officer Gordon Costa testified that they questioned Petitioner separately on November 17, 1981. Officer Michael Butler stated that he was

present with Detective Neus during one interview with Petitioner. Each testified that Petitioner was informed of his *Miranda* rights, stated that he understood these rights, and agreed to talk. Each stated that Petitioner did not appear intoxicated. FN7 (RT 6/23/82 at 8-14, 16-23, 36-39.) Officer Butler testified that Petitioner did not request an attorney at any time he was present during questioning and did not refuse to answer any questions. (*Id.* at 12, 20.) Officer Costa also testified that Petitioner never requested an attorney or refused to answer any questions. (*Id.* at 38-39.) Officers Butler and Costa also stated that Petitioner was not coerced into answering questions. (*Id.* at 12, 38.)

> FN7. Petitioner himself stated he was not under the influence of drugs or alcohol when he was interviewed by Detective Neus. (RT 6/23/82 at 41.)

Detective Neus testified Petitioner did not request a lawyer during his questioning. (RT 6/23/82 at 20.) Neus stated that he made no threats or promises to get Petitioner to answer questions. (*Id.*) He also testified that Petitioner never told him he did not wish to talk to him, but did tell him he did not want to answer any questions concerning Juan Maya's disappearance or how he came into possession of Maya's car because he was fearful of others who were involved in these matters. (*Id.* at 21.) Neus testified that Petitioner continued to answer other questions. (*Id.*)

Officer David Owen testified that he was present during an interview conducted by Detective Bob Brunansky on November 18, 1981. Owen testified that

Petitioner was Mirandized and stated he understood his rights. He also testified that Petitioner did not appear to be intoxicated or under the influence of drugs and that no threats or promises were made to get him to answer questions. (RT 6/23/82 at 31-32.) Owen testified that Petitioner was "annoyed" and "evasive" during questioning. He stated that Petitioner did not refuse to answer any questions but told them to ask Detective Neus if they wanted to know about the forgery charge because he had answered those questions the day before when questioned by Neus. (*Id.* at 32.) Owen testified that at one point during questioning Petitioner stated he had not talked to an attorney and did not want to talk to them any more. At that point, all questioning stopped. (*Id.* at 33.)

Petitioner testified last. He noted that Detective Neus first questioned him about the forgery. He stated Neus then asked questions "about the whereabouts of the person whose car it was [he had]" and he told him he didn't want to talk about it.[FN8] (RT 6/23/82 at 40.) On cross-examination, Petitioner acknowledged that he never asked to cease all questioning:

> FN8. Petitioner was originally arrested on forgery charges relating to trying to cash a convenience check in Juan Maya's name. The other charges were brought subsequently.

> [Prosecutor]: You didn't indicate to [Neus] that you didn't absolutely want to talk to him?
>
> [Petitioner]: Well, I'm not very well versed in these procedures. But I really didn't want to answer any

questions pertaining to the vehicle ...

[Prosecutor]: But you would answer other questions, you answered questions about the forgery?

[Petitioner]: Yes.

[Prosecutor]: And you didn't ask for an attorney?

[Petitioner]: No.

[Prosecutor]: And you didn't just shut up?

[Petitioner]: Well, at certain points I wouldn't say anything for awhile, but they would just proceed asking me questions.

[Prosecutor]: And then you would answer them?

[Petitioner]: Well, if they asked me a question that I felt should be answered I would answer it.

[Prosecutor]: So when you're saying you didn't want to answer some questions you would answer part of the questions, you wanted to pick and choose which question that you wanted to answer; correct?

[Petitioner]: I wanted to answer the questions that I felt I should answer.

[Prosecutor]: I see. And you wanted to be the one in control of which ones you were going to answer?

[Petitioner]: Not necessarily. Just certain questions I

didn't want to answer.

[Prosecutor]: But others you would?

[Petitioner]: Yes.

(RT 6/23/82 at 42-43.)

Following all testimony, the trial court ruled from the bench, stating simply that it found the statements made by Petitioner to officers during these post-arrest interviews "to be made voluntarily." (RT 6/23/82 at 46.)

Analysis

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that any prisoner in custodial interrogation must be informed of his right to remain silent, as well as his right to an attorney and to have the attorney present during questioning. In addition:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda, 384 U.S. at 473-74. In *Edwards v. Arizona*, 451 U .S. 477, 484 (1981), the Court held that "after being advised of his *Miranda* rights, the accused may himself validly waive his right and respond to interrogation." Any waiver must be voluntary,

knowing, and intelligent. *Id.* at 483.

Butler, Neus, and Costa testified Petitioner was advised of his rights during interviews conducted by them on November 17, 1981, seemed to understand them, agreed to answer questions, and at no time requested an attorney. (RT 6/23/82 at 12, 19-20, 38-39.) Officer Owen testified that Petitioner did request an attorney during the course of an interview conducted on November 18, 1981, and that when the request was made all questioning ceased. (*Id.* at 32-33.) Petitioner conceded he was Mirandized prior to his interviews with police. (*Id.* at 39-40.) He also stated he was not intoxicated at the time of the interviews. (*Id.* at 41.) Although Petitioner indicated he did not wish to answer certain questions, he conceded he did not categorically refuse to answer all questions, only questions related to Maya's disappearance and how he came into possession of Maya's car. (*See id.* at 42-43.) He stated he did not want to answer questions on these latter topics because he was fearful of those who were involved. (*Id.* at 12, 20, 42.) He does not dispute Officer Owen's testimony that all questioning ended once he told Owen and Brunansky he wanted to talk with an attorney and stop talking to them. (*Id.* at 33.)

In light of the officers' testimony and Petitioner's own statements at the suppression hearing, the PCR court's denial of relief was not objectively unreasonable in light of the principles outlined in *Miranda* and *Edwards*. Based on this testimony, the PCR court could reasonably have concluded Petitioner did not indicate a desire to cease all questioning prior to the time he told Brunansky and Owen he wanted to talk to a lawyer

and stop the questioning and that his statements to police up to that point were knowing, voluntary, and intelligent. *See* Edwards, 451 U.S. at 483; *see also* Davis v. United States, 512 U.S. 452, 459 (1994) (holding that an "ambiguous or equivocal" desire for an attorney did not invoke right to silence requiring cessation of questioning).

In Claim 16, Petitioner alleges that the state violated his constitutional right to remain silent when the prosecutor remarked during closing that he remained silent and did not deny involvement in the crime. (Dkt. 13 at 38; Dkt. 83 at 60.) During closing argument, the prosecutor stated as follows:

> And then he was arrested and taken downtown and he was talked to by detectives, and he was told that because he had Juan Maya's possessions and personal belongings, and Juan Maya was missing, that he could be charged with homicide.
>
> What did he respond? Did he say: Hey, I didn't do it? No, it wasn't me. You've got the wrong person. I may have his credit cards, I may have had his car, and I may have had his clothes and his belt, but I did not do it. No. He didn't say that.
>
> What did he say? He said, "You've got to prove it in Court. You've got to have the body." Why did he say that?....

(RT 6/30/82 at 18.)

Upon review of the record, the Court does not believe

the state PCR court's denial of relief on this claim was objectively unreasonable in light of pertinent Supreme Court precedent. *See* Griffin v. California, 380 U.S. 609 (1965) (holding that the Fifth and Fourteenth Amendments prohibit the prosecution from commenting on an accused's silence). Petitioner did not remain silent during pre-trial interviews with police and the prosecutor did not comment on Petitioner's silence; rather, she recounted one of his statements to police. The prosecutor's reference to one of those statements did not violate Petitioner's federal constitutional rights.

Claim 6-Prosecution References to Petitioner's Prior Felony Convictions and Alleged "Escapee" or "AWOL" Status

Petitioner contends that on several occasions at trial the prosecution either referred to or elicited testimony about his prior convictions. He asserts "[t]he admission and the State's repeated references [to][his] prior felony convictions denied [him] his right to a fair trial under the Fifth, Sixth and Fourteenth Amendments." (Dkt. 13 at 35; *see also* Dkt. 65 at 31-34.) Petitioner cites the following examples: the prosecutor's reference in her opening statement to Petitioner being "AWOL from the [Maricopa County Jail] Work Furlough Program" at the time of Maya's murder (Dkt. 65 at 32); the prosecutor's comment during her closing argument that police would have been looking for Petitioner at the time of the murder due to his AWOL status (*id.* at 32-33); trial testimony from Detective Thomas Neus elicited by the prosecution wherein Neus stated Petitioner told him during an interview that he wanted

Maya's car so he could get out of state because he was a "walk-away" from the work furlough program (RT 6/23/82 at 39); and Daniel McIntosh's testimony, both on direct examination and on cross-examination, that Petitioner wanted the car so he could leave the state because "he escaped from the Durango facility" (*see* RT 6/28/82 at 13, 37).

On direct appeal, the Arizona Supreme Court, citing *State v. Ferguson*, 120 Ariz. 345, 586 P.2d 190 (1978), and Arizona Rule of Evidence 404(b), agreed that references to Petitioner's escape status were tantamount to informing the jury of his prior convictions. *Libberton*, 141 Ariz. at 137, 685 P.2d at 1289. However, the court held that the references were nevertheless admissible to show motive-specifically, to show that Petitioner wanted the car and money to leave the state and avoid capture, and that he killed the victim to hinder detection of the theft. *Id.* at 138, 685 P.2d at 1290.

This Court may only grant habeas relief on a claim alleging erroneous admission of evidence if the error "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72.Rule 404(b) of the Arizona Rules of Evidence provides that evidence of other "crimes, wrongs or acts" is admissible to show "proof of motive." The witnesses testified that Petitioner told them he wanted Maya's car so he could leave the state because of his escapee status. (*See* RT 6/23/83 at 39; RT 6/28/82 at 13.) Therefore, the court's conclusion that references to Petitioner's escapee status from the prison work furlough program established a motive for Petitioner's

participation in the crimes against Maya was reasonable and the admission of the evidence was not erroneous. Under these circumstances, Petitioner has not established that the references to his escapee status violated his right to due process of law under the federal constitution.

Claim 7-Trial Court Failed to Give Cautionary Instructions About Petitioner's Prior Convictions and AWOL Status

Petitioner contends that his due process right to a fair trial under the Fifth and Sixth Amendments was violated when the trial court failed "to give an immediate cautionary instruction and an instruction at the conclusion of the evidence that evidence of Petitioner's prior convictions was admissible only to show motive." (Dkt. 13 at 36; Dkt. 65 at 34.) Petitioner concedes that defense counsel did not request such an instruction, but argues the trial court should have provided the instruction *sua sponte*. (*See* Dkt. 65 at 34.)

Petitioner has failed to cite any clearly established federal law holding that the trial court's failure to give such a motive instruction, *sua sponte,* violated due process of law. In the absence of such authority, Petitioner's conclusory assertion is without merit and will be denied. *Musladin*, 127 S.Ct. at 654; *Williams*, 529 U.S. at 381.

Claim 11-Trial Court Failed to Instruct on Lesser Included Offenses

Petitioner contends the trial court violated his federal constitutional rights by failing to instruct the jury on the lesser-included offense of second degree murder. (Dkt. 13 at 37.) Specifically, he contends that evidence at trial, including evidence of the circumstances surrounding the crime as testified to by Martin Norton, and evidence of Petitioner's intoxication, negates the element of premeditation. (*See* Dkt. 65 at 29-30; Dkt. 83 at 58-59.)

A capital defendant is entitled to an instruction on a lesser-included offense "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him on the greater." *Beck v. Alabama*, 447 U.S. 625, 635 (1980) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). The Supreme Court held that this safeguard is necessary because "when evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the 'third option' of conviction on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. An instruction on a lesser-included offense is required by due process only if warranted by the evidence. *Hopper v. Evans*, 456 U.S. 605, 611 (1982).

At the outset, the Court notes that the trial court instructed the jury on two theories of first-degree murder: premeditated murder and felony murder. *See State v. Tucker*, 205 Ariz. 157, 167, 68 P .3d 110, 120 (2003) ("There is only a single crime of first degree murder.... Felony murder is not a separate offense ...

rather they are simply two forms of first degree murder.") Because "[n]o lesser-included homicide offense exists for felony murder ... the trial court did not err by failing to so instruct on the felony murder theory." *State v. Lopez*, 163 Ariz. 108, 112, 786 P.2d 959, 963 (1990).

Under Arizona law, second degree murder is a lesser-included offense of premeditated first degree murder. Only premeditation distinguishes this crime from the lesser-included offense of second degree murder. *See State v. Marvin*, 124 Ariz. 555, 557, 606 P.2d 406, 408 (1980); *Vickers v. Ricketts*, 798 F.2d 369, 371 (9th Cir.1986). A defendant kills with premeditation if he "acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion." A.R.S. § 13-1101(1). A period of reflection of "any length of time" after forming the intent to kill is sufficient to show premeditation. *Clabourne v. Lewis*, 64 F.3d 1373, 1380 (9th Cir.1995).

Petitioner cites evidence at trial indicating he was intoxicated during the relevant time period. Even assuming evidence was presented of his voluntary intoxication at the time of the crimes, this is not sufficient, as a matter of law, to negate premeditation. In *State v. Schurz*, 176 Ariz. 46, 54-55, 859 P.2d 156, 164-65 (1993), the Arizona Supreme Court noted that under A.R.S. § 13-503, "the jury may consider voluntary intoxication in determining culpable mental state only when the culpable mental state of

'intentionally or with the intent to' is a necessary element of the offense." *See also* State v. Ramos, 133 Ariz. 4. 5, 648 P.2d 119, 120 (1982) (in light of the passage of § 13-503 "the jury may consider [voluntary] intoxication only if the crime charged requires the culpable mental state of intentionally or with the intent to.") The *Schurz* court further noted that under A.R.S. § 13-1105(A)(1) the culpable mental state for murder in the first degree is "[i]ntending or knowing that his conduct will cause death ." 176 Ariz. at 54-55, 859 P.2d at 164-65. These statutory provisions were passed in 1980 and were in effect at the time of Maya's murder. *See Ramos*, 133 Ariz. at 5, 648 P.2d at 120. Prior to the passage of these laws, "the jury could consider voluntary intoxication on the question of malice aforethought which was then an essential element of murder." *Schurz*, 176 Ariz. at 54, 859 P.2d at 164. However, as noted in *Schurz*, A.R.S. §§ 13-503 and 13-1105(A)(1), "have changed all that." *Id.* In light of these statutory changes, the court stated:

> The question before us is whether voluntary intoxication is material because the charge against the defendant is "intending or knowing rather than merely 'knowing.' " Knowing is a less culpable mental state than intent but is included within it so that whenever a jury determines that a defendant has acted intentionally, it has necessarily concluded that he acted knowingly. A.R.S. § 13-202(C). *Having concluded that the defendant acted knowingly, the jury may not consider voluntary intoxication with respect to the defendant's culpable mental state. It follows that the giving of a voluntary intoxication instruction in a murder case in which both intent and*

> *knowing are alleged would be improper.* It would be plainly violative of A.R.S. § 13-503. In short the "intending" component of an allegation of "intending or knowing" is superfluous. The jury should never reach the question of intent and, thus, the voluntary intoxication instruction would always be erroneous. As a matter of logic and statutory construction, an allegation of "intending or knowing" is indistinguishable from an allegation of "knowing." An inexorable result of the statute, then, is that voluntary intoxication under A.R.S. § 13-503 will be considered by the jury only when intent is alleged and knowing is not alleged.

Id. at 55, 859 P.2d at 165 (emphasis added); *Lopez*, 163 Ariz. at 112, 786 P.2d at 963 ("[T]he jury may consider voluntary intoxication to negate the mental state of 'intentionally' but not the mental state of 'knowingly.' "); *see also Ramos*, 133 Ariz. at 6, 648 P.2d at 121 (upholding federal due process challenge to A.R.S. § 13-503).

In light of the provisions in A.R.S. §§ 13-503 and 13-1105(A)(1), the holdings of the Arizona Supreme Court in *Schurz, Lopez* and *Ramos,* and the fact that the trial court instructed the jury that the proper mental state in support of premeditated first degree murder is that the defendant "intended *or* knew" his conduct would cause the death of another (*see* RT 6/30/82 at 41), voluntary intoxication does not negate a finding of first degree murder. Therefore, Petitioner was not entitled to a second degree murder instruction based on the claim he was intoxicated.

Petitioner cites other evidence that he claims supported a lesser-included second degree murder instruction. Specifically, he asserts that Martin Norton testified that he and Petitioner "stood by while James first shot toward the victim's chest and tried to fire a second shot, but the gun was malfunctioning. The victim then began grappling with James for the gun. Only at that point did Petitioner intervene.... Based on that testimony-which was the only evidence of Petitioner's involvement in the murder-a jury could well find that Petitioner did not premeditate his actions." (Dkt. 65 at 29-30.)

The allegation that Petitioner reacted impulsively in participating in Maya's killing once James and the victim began struggling at the murder site is speculative, at best, and contrary to the evidence presented at trial. In fact, other significant evidence supports the court's decision not to give a second degree murder instruction. For instance, Norton testified that over a period of several hours, beginning while they were still in Phoenix at James's trailer, Petitioner and James agreed they should kidnap Maya, take him in his car to an abandoned mineshaft in Salome, and kill him there. (RT 6/28/82 at 26-27.) Additional testimony from Norton revealed that Petitioner personally held a gun on Maya for the duration of the trip to Salome and threatened to shoot him if he made any noise or called for help when they were pulled over by a patrol officer during that trip. (*Id.* at 30-31.) Norton's testimony supports a conclusion that Petitioner participated in the planning and execution of Maya's murder and that this took place over a long period of time (several hours), ample time

for Petitioner to reflect on the deed. *See State v. Thompson*, 204 Ariz. 471, 479, 65 P.3d 420, 248 (2003) (circumstantial evidence that may prove premeditation includes "threats made by the defendant to the victim, a pattern of escalating violence between the defendant and the victim, or the acquisition of a weapon by the defendant before the killing."); *see also Clabourne*, 64 F.3d at 1380 (a period of reflection of "any length of time" after forming the intent to kill is sufficient to show premeditation.)

In light of the fact the trial court instructed the jury that premeditated murder required either the intent or knowledge that he would cause the death of another (*see* RT 6/30/82 at 41; *see also Schurz*, 176 Ariz. at 55, 859 P.2d at 165; *Lopez*, 163 Ariz. at 112, 786 P.2d at 963), together with the evidence of Petitioner's active participation, over a period of several hours, in the events leading to Maya's execution, the PCR court's denial of relief on this issue was not objectively unreasonable under the principles outlined in *Beck*. *See Hopper*, 456 U.S. at 611 ("due process requires that a lesser-included offense instruction be given *only* when the evidence warrants such an instruction.")

Claim 20-Trial Court Failed to Consider and Give Effect to All Relevant Mitigating Evidence

Petitioner contends that the trial court refused to consider the following mitigating evidence at sentencing: (1) his youth; (2) his impulsive conduct, inability to premeditate, and abusive childhood; (3) the state's failure to give him promised psychiatric treatment; (4) his lack of a previous record of violence;

(5) the fact that his prior felony record stemmed from his abusive father filing charges against him; and (6) the fact that his conduct was that of a follower and that he did not initiate the crime. (Dkt. 13 at 39; *see also* Dkt. 65 at 36-39.)

The record does not indicate that the parties filed sentencing memoranda prior to the mitigation hearing. It is Petitioner's contention that all of the mitigating circumstances at issue were presented to the sentencing court but the court simply failed to consider them. (*See* Dkt. 65 at 36-39.) At sentencing, the trial court stated:

As to mitigating circumstances, the Court finds the following:

1) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was not significantly impaired and certainly not so impaired as to constitute a defense to prosecution.

2) The defendant was not under unusual or substantial duress.

3) The defendant was one of the individuals who actually committed the offense and was not found guilty by reason of being legally accountable for the conduct of another person, the provision of A.R.S. § 13-303, therefore, this mitigation does not exist.

4) The defendant could have seen that his conduct in the course of the commission of the offense for which

the defendant was convicted would cause or create a grave risk of causing death to another person, therefore, this mitigating circumstance does not exist.

5) The Court does not find that the defendant's age, to wit, 20 years of age at the time of the offense and 21 at the time of Sentencing could be a mitigating circumstance.

6) The Court does not find any other mitigating circumstances.

(RT 10/25/82 at 7-8.) Upon making these findings, the sentencing court concluded that death was the appropriate sentence, finding "there are no mitigating circumstances significantly substantial [to warrant a lesser sentence]." (*Id.*)

The Arizona Supreme Court upheld the trial court's findings, stating:

The appellant urged several non-statutory mitigating circumstances: that he is a follower and merely followed the lead of James in committing the murder, that he had been promised but was never given psychological care while in custody previously, that he was young (20 years) at the time of the crime, that he has no previous record of violence, and that he would not have a juvenile record were it not for his own father filing charges against him.

In response, we first note that from the beginning the appellant actively participated in the crime, and

> even pointed the gun at Maya on the way to Salome. Second, there is no evidence that appellant's ability to appreciate the wrongfulness of his acts was substantially impaired. Third, the sentencing court specifically found that the appellant's age was not a mitigating factor. Considering the deliberation involved in the crime, and the duration of the crime, we agree that the appellant's age is not a sufficient factor to call for leniency. [Citation omitted.] Finally, we agree with the trial court that all of appellant's claimed mitigating circumstances, considered as a whole, are not sufficiently substantial to call for leniency.

Libberton, 141 Ariz. at 140, 685 P.2d at 1292.

Under clearly established federal law, the sentencing court is required to consider any mitigation offered by Petitioner, including non-statutory mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Ceja v.* Stewart, 97 F.3d 1246, 1251 (9th Cir.1996). However, it is up to the sentencer and the state appellate courts to determine the weight to be given the mitigation evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982); *Ceja*, 97 F.3d at 1251.

The trial court did not categorically exclude the presentation or consideration of any type of mitigation. *See Eddings*, 455 U.S. at 113-14 (holding that court may not refuse to consider mitigating evidence as a matter of law); *Lockett*, 438 U.S. at 608 (holding that statute may not categorically exclude consideration of mitigating evidence). Petitioner has presented nothing to indicate the court did not consider all relevant

mitigation (*see* RT 10/25/82 at 7-8); in the absence of such an indication, "[t]rial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overturned on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). The heart of Petitioner's contention appears to be that the Arizona courts were obligated to find the evidence he presented to be mitigating. The Constitution does not require such a finding. There is a distinction between "a failure to consider relevant evidence and a conclusion that such evidence was not mitigating"; the latter determination does not implicate the Constitution. *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir.2006).

Moreover, the Arizona Supreme Court independently reviewed Petitioner's proffered mitigation and agreed that "appellant's mitigating circumstances, considered as a whole, are not sufficiently substantial to call for leniency." *Libberton*, 141 Ariz. at 140, 685 P.2d at 1292. Even if the trial court had committed constitutional error at sentencing, a proper and independent review of the mitigation and aggravation by the Arizona Supreme Court cured any such defect. *See Clemons v. Mississippi*, 494 U.S. 738, 750, 754 (1990) (holding that appellate courts are able to fully consider mitigating evidence and are constitutionally permitted to affirm a death sentence based on independent re-weighing despite any error at sentencing).

Under these circumstances, Petitioner has not demonstrated the PCR court's denial of relief on these issues was objectively unreasonable in light of the

principles outlined in *Lockett* or *Eddings*. This claim must fail.

Claim 21-Trial Court Improperly Considered Evidence of Petitioner's Felony Record

Petitioner contends the trial court improperly considered his two prior non-violent felony convictions as an aggravating circumstance in imposing a death sentence, in violation of his Eighth and Fourteenth Amendment rights. He cites the fact that the trial court admitted testimony about these crimes and, just prior to imposing the death penalty, "noted that '[t]he defendant was on probation at the time he committed the offense.' " (Dkt. 65 at 39; *see also* Dkt. 13 at 39-40.)

"Non-statutory" aggravation evidence is not recognized in Arizona; the only aggravating circumstances allowed to support a death sentence are enumerated in the governing statute, A.R.S. § 13-703(F), and the sentencing court may only consider evidence in aggravation that tends to establish a statutory factor. *State v. Gulbrandson*, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995); *State v.. Atwood*, 171 Ariz. 576, 673, 832 P.2d 593, 656 (1992), *overturned on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). Absent evidence to the contrary, a judge is presumed to focus only on relevant sentencing factors. *State v.. Beaty*, 158 Ariz. 232, 244, 762 P.2d 519, 531 (1988).

The record does not support the conclusion that the sentencing court considered Petitioner's prior felony convictions in imposing a death sentence. The court did note that petitioner was on probation at the time he

committed the crimes against Maya. (RT 10/25/82 at 5.) However, Petitioner's probationary status arose as the court considered whether to impose aggravated and consecutive sentences for Petitioner's *non-capital crimes,* not as an aggravating circumstance with respect to imposition of the death penalty. (*See id.*) This conclusion is bolstered by the court's citation to A.R.S. § 13-702(b), which deals with aggravating circumstances related to *non-capital* crimes. In sum, review of the sentencing transcript shows that the state court did not use Petitioner's prior felonies and probation status as an aggravating factor in imposing the death penalty. This claim will be denied.

Claim 22-Trial Court Improperly Considered Sentencing Recommendations from Victim's Family

Petitioner next contends that his rights under the Sixth, Eighth, and Fourteenth Amendments were violated because "[t]he trial court considered a Presentence Report in sentencing [him] to death" and the report contained recommendations from family members and the probation officer who authored the report that Petitioner be sentenced to death. (Dkt. 65 at 35.)

In the Presentence Report ("PSR"), the author recounted the views of four of Maya's relatives on the terrible impact his murder had upon them and their family. The author further stated that each of the four recommended that Petitioner be given a death sentence. (ROA, Vol. 2, Item 139 at 2-3.) The PSR author recommended that Petitioner be given the "maximum" sentence permitted by law. (*Id.* at 7, 8.)

As an initial matter, when Petitioner was sentenced in 1982, there was no clearly established Supreme Court law governing the admission of victim evidence. Petitioner relies on the cases of *Booth v. Maryland*, 482 U.S. 496, 509 (1987), and *Payne v. Tennessee*, 501 U.S. 808, 825, 827 (1991), both of which were decided after he was sentenced. In the absence of clearly established Supreme Court law, the state court decision denying this claim was not objectively unreasonable. *Musladin*, 127 S.Ct. at 654 (denying habeas relief in absence of clearly established federal law).

Moreover, the sentencing transcript and Special Verdict clearly establish that the court's determination to impose a death sentence was based upon its finding of two statutory aggravating factors together with its finding that any mitigation was not sufficiently substantial to call for leniency. (*See* RT 10/25/82 at 6-8.) Nowhere in imposing sentence does the court indicate that recommendations from the victim's family or third parties played a role in its determination. (*See id.*) This claim will be denied.

Claims 24 and 36-Trial Court Failed to Find Aggravating Factors Beyond a Reasonable Doubt

In Claim 24, Petitioner asserts his federal constitutional rights were violated when the trial court failed to find the existence of aggravating factors beyond a reasonable doubt. (Dkt. 13 at 40.) Claim 36 is related, asserting that Petitioner's rights were violated when the trial court failed "to make meaningful findings about the facts, reasoning, and legal principles

(e.g., the construction of the cruel, heinous, or depraved aggravator it applied) that allegedly support its decision to impose death"; according to Petitioner, this failure "deprived [him] of meaningful appellate review to ensure that his death sentence was not imposed arbitrarily or irrationally." (*Id.* at 44.)

As noted, the trial court found two aggravating factors justifying the death penalty: that the murder was committed for pecuniary gain and that the offense was especially cruel, heinous or depraved. (RT 10/25/82 at 6.) The court did not expressly state that it found the two aggravating factors proved *beyond a reasonable doubt*. However, the Arizona Supreme Court has held that aggravating circumstances must be proved beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828 (1980). This Court will presume the sentencing court applied the correct standard. *Walton*, 497 U.S. at 653 ("Trial judges are presumed to know the law and to apply it in making their decisions."); *Ceja*, 97 F.3d at 1250 (presuming Arizona courts used a reasonable doubt standard without use of the specific language).

Moreover, the Arizona Supreme Court applied the "beyond a reasonable doubt" standard in its independent review on appeal. *See Libberton*, 141 Ariz. at 139-40, 685 P.2d at 1291-92. Thus, even if the sentencing court failed to apply the correct standard, "a state appellate court may itself determine whether the evidence supports the existence of aggravating circumstances" and, if it so finds, uphold the death sentence. *Walton*, 497 U.S. at 654. The Arizona Supreme Court did just that.

As a separate matter, Petitioner contends the trial court failed to provide sufficient written findings in support of the death sentence, which deprived him of meaningful appellate review. Petitioner's citation to *Dobbs v. Zant*, 506 U.S. 357, 358-59 (1993) is unavailing as it holds only that capital sentences should be reviewed on the entirety of the available record; it does not require a trial court to make any specific findings or record for purposes of appellate review. Because the merits of Petitioner's claim are not squarely governed by clearly established Supreme Court law, he cannot obtain habeas relief. *Musladin*, 127 S.Ct. at 654 (denying habeas relief in absence of clearly established federal law); *see also Lopez v. Schriro*, --- F.3d ----, No. 06-99000, 2007 WL 1760589 at *7 (9th Cir. June 20, 2007) (holding there is no established Supreme Court law or constitutional requirement that a particular sentencing record be produced by the trial court).

Furthermore, as previously stated, the Arizona Supreme Court conducted an independent review of Petitioner's death sentence, which included an independent determination of the existence of aggravating and mitigating circumstances. *See Libberton*, 141 Ariz. at 139, 685 P.2d at 1291. The court stated, "we independently review the record to determine the existence or absence of aggravating and mitigating circumstances, and to determine whether the death penalty should be imposed." *Id.* This review was not limited to the sentencing "record" created by the trial court, but extended to the entire evidentiary record. In *State v. White*, the court explained:

> This independent review includes a painstaking search of the entire record for error, an examination of the facts that establish the presence or absence of aggravating and mitigating circumstances, and a separate determination of whether the latter circumstances outweigh the former when both are present.

168 Ariz. 500, 521, 815 P.2d 869, 890 (1991), *abrogated on other grounds by State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992). Because the state supreme court's review is not dependent on the trial court's sentencing record, any alleged deficiencies in that record do not inhibit the state appellate court's constitutional review.

Claims 24 and 36 will be denied.

Claims 9 and 41-Improper Vouching

In Claim 9, Petitioner contends that by presenting witness Martin Norton's plea agreement to the jury and examining him about its contents, the prosecution improperly vouched for his credibility. (Dkt. 13 at 36; Dkt. 65 at 31.) Similarly, in Claim 41, Petitioner argues that a questionnaire given to prospective jurors improperly vouched for Norton's credibility. (Dkt. 13 at 46.) Petitioner asserts that this conduct violated his right to due process of law and a fair trial under the Sixth and Fourteenth Amendments. In addition, Petitioner contends the questionnaire "constituted a charge to the jury and a comment on matters of fact by the court in violation ... of [his] rights to due process

and a fair trial under the Sixth and Fourteenth Amendments." (Dkt. 13 at 46; Dkt. 65 at 31.)

Vouching

Petitioner cites several examples of improper vouching. In his amended petition and merits brief, he contends that the State "improperly" introduced Norton's plea agreement into evidence in its case in chief and examined Norton on its contents. (*See* Dkt. 13 at 36; Dkt. 65 at 31.) The plea agreement states, in pertinent part:

> (1) Martin David Norton agrees to testify fully and truthfully in any proceedings determined to be necessary by the State of Arizona regarding the victim Juan Maya and/or in any criminal prosecution of Lawrence Keith Libberton or Steven Craig James....

(Dkt. 14, Ex. 17 at 1.) Petitioner did not object and the request for admission was granted. (*See* RT 6/28/82 at 54.)

Petitioner also contends that the questionnaire given to prospective jurors vouched for Norton's credibility because it too referred to the fact that Norton was testifying pursuant to a plea agreement requiring truthful testimony. (Dkt. 13 at 46; Dkt. 65 at 31.) The questionnaire states, in pertinent part:

> 13. The evidence will further show that Martin Norton has already admitted his guilt in juvenile court and has been sentenced as a juvenile. In return

for the State's agreement that he should be sentenced as a juvenile with a maximum incarceration time of up to the age of 18 years, Martin Norton has agreed to testify truthfully in all proceedings necessary against Lawrence K. Libberton and Stephen C. James. Do you believe that such a plea agreement is unfair to either Lawrence K. Libberton or Stephen C. James?

Yes ____ No ____

(Dkt. 14, Ex. 12 at 4.)

Petitioner next contends that the prosecutor engaged in improper vouching when she exhorted jurors at opening to "[s]it and listen to Martin Norton testify truthfully." (*See* Dkt. 83 at 55; RT 6/23/82 at 13.) He also asserts that the court engaged in improper vouching by "telling jurors from the bench that 'Martin Norton has agreed to testify truthfully in all proceedings necessary against [Petitioner].' " (Dkt. 65 at 31; RT 6/21/82 at 6.)

Prosecutorial misconduct occurs when a prosecutor vouches for the credibility of a witness. *United States v. Young*, 470 U.S. 1, 18-19 (1985); *Lawn v. United States*, 355 U.S. 339, 359-60 n. 15 (1958); *United States v. Berger*, 295 U.S. 78, 86-88 (1935). "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir.1993) (citing *Unites States v. Molina*, 934

F.2d 1440, 1445 (9th Cir.1991); *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980)). In *Necoechea*, the Ninth Circuit noted:

> Vouching is especially problematic in cases where the credibility of witnesses is crucial, and in several cases applying the more lenient harmless error standard of review, [courts] have held that such prosecutorial vouching requires reversal. [Citation omitted.] At the same time, we have recognized that prosecutors must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence, including that one of the two sides is lying. [Citations omitted.]

986 P.2d at 1276.

To warrant habeas relief, Petitioner must show that any vouching "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)); *see also Davis v. Woodford*, 384 F.3d 628, 643-44 (9th Cir.2004) (applying *Darden* standard to claims involving prosecutorial misconduct, in particular, prosecutorial vouching).

The jury questionnaire's reference to Norton's plea agreement's "truthful testimony" clause, the admission of the plea agreement into evidence during the State's direct examination of Norton, and the prosecutor's exhortation to the jury to listen to Norton testify "truthfully," did inform and remind the jury that Norton signed a plea agreement requiring that he

testify truthfully. Such references can constitute improper vouching. *See* *United States v. Lew*, 875 F.2d 219, 223 (9th Cir.1989) (citing *United States v. Wallace*, 848 F.2d 1464, 1474 (9th Cir.1988) for the proposition that "it was improper to allow the prosecution to elicit testimony on direct examination regarding the truthfulness requirement of a plea agreement.") However, "a reference to the 'truthful testimony' provisions of a witness's agreement with the government does not constitute vouching if it is made in response to an attack on the witness's credibility because of his plea bargain." *United States v. Monroe*, 943 F.2d 1007, 1013 (9th Cir.1991); *see also* *United States v. Shaw*, 829 F.2d 714, 716 (9th Cir.1987).

In this case, the questionnaire, the admission of the plea agreement into evidence, the prosecutor's examination of Norton about its contents, and her exhortation to jurors during opening to "[s]it and listen to Martin Norton testify truthfully," were presented to jurors before any attack by the defense on Norton's credibility; thus, they were not offered in direct rebuttal to defense attacks on his credibility and do not meet the vouching exception set forth in *Monroe* and *Shaw*. Nevertheless, the Court believes that these references were harmless and, thus, insufficient to warrant habeas relief. *See* *Brecht v. Abrahamson*, 507 U.S. 619, 622-23 (1993) (holding that trial error does not warrant habeas relief unless it "had substantial and injurious effect or influence in determining the jury's verdict.") (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

The Ninth Circuit's decision in *Shaw* is instructive. In

that case, as in this case, the witness's plea agreement and the reference to truthful testimony were referenced *prior* to any attack on the witness's credibility. The government argued that if such references are permissible to rebut an attack on a witness's credibility, they should not be considered vouching simply because the government anticipates a defense attack on the witness's credibility. *Shaw*, 829 F.2d at 717. Addressing this argument, the court stated:

> There is some logic to the government's argument, but we cannot accept it in its entirety. As we recognized in *[United States v.] Roberts* [, 618 F.2d 530 (9th Cir.1980)], every plea agreement that contains a requirement of truthful testimony contains an implication, however muted, that the government has some means of determining whether the witness has carried out his side of the bargain. [Citation omitted.].... When the prosecution refers, as it did here, to the requirement of truthfulness before the issue of bias is drawn, it runs the risk that its reference will be interpreted as an attempt to establish truthfulness and suggest verifiability.
>
> *We agree, however, with the government that what was said is more important than when it was said, at least in a case such as this one where an attack on the witness' credibility was almost certain to be forthcoming ....*
>
> In light of all the circumstances of this case, however, we do not regard the statement (or the less suggestive testimony of the witness regarding the

> plea bargain) as cause for reversal.... We consequently conclude that it is more probable than not that the vouching did not materially affect the verdict; the error was harmless.

Shaw, 829 F.2d at 717-18 (emphasis added).

In light of *Shaw* and the factors outlined in *Necoechea*, any reference to Norton's plea and its "truthful testimony" requirement was harmless and did not so infect the trial with unfairness as to make his subsequent conviction a denial of due process. For instance, the jury questionnaire was designed to determine if jurors would fairly consider Norton's testimony, even though he was young, had pleaded guilty to the crimes, and had received a favorable plea deal. In addition, nothing in the questionnaire or plea agreement, or in the prosecutor's exhortation to jurors to "listen to Martin Norton testify truthfully," implied that she or the trial court were able to discern or had any way of discerning if Norton would in fact testify truthful. In fact, the court specifically instructed the jury that "what the attorneys say to you during Opening Statements is not evidence and is not to be considered by you as evidence." (RT 6/23/82 at 5; *see also* 6/30/82 at 39.) The court also instructed jurors that they "must decide the accuracy of each witness' testimony" taking account of a witness's "ability and opportunity to observe, his memory, manner while testifying, any motive or prejudice he might have, and any inconsistent statements he might have made." (RT 6/30/82 at 39.) Also militating against a finding of unfair vouching is the fact that the court instructed the jury that a witness's felony conviction was relevant in

considering his credibility. (*See id.* at 40.)

Finally, as in *Shaw,* although the questionnaire and Norton's plea agreement brought Norton's requirement for truthful testimony to the attention of prospective jurors prior to any attack on Norton's credibility by the defense, it was a virtual certainty that such an attack would be forthcoming. Norton was the only eyewitness to Maya's murder offered by the State, he admitted his own participation in Maya's murder, and had what could be described as a troubled adolescence. In addition, there were multiple inconsistencies between his initial police statements and his December 29, 1981 statement, as well as his trial testimony. Defense counsel's lengthy cross-examination focused almost exclusively on Norton's credibility, highlighting his motive to testify against Petitioner in return for favorable treatment as a juvenile. (*See* RT 6/29/82 at 178-80; *see also* RT 6/30/82 at 30.)

In sum, the references to Norton's plea agreement in the questionnaire, the admission of the plea agreement itself into evidence by the State on direct examination, and the prosecutor's exhortation to jurors to listen to him testify truthfully, even if amounting to vouching, did not "so infect[ ] the trial with unfairness" as to make his conviction a denial of due process of law. *See Darden,* 477 U.S. at 181.

As a final matter, Petitioner's claim that the trial court "endorsed" Norton's veracity when it told prospective jurors he "agreed to testify truthfully in all proceedings necessary against [Petitioner]" is a mischaracterization. Review of the record shows that

the court was merely reading question no. 13 of the jury questionnaire to a potential juror who had failed to answer it. (*See* RT 6/21/82 at 6-7.) The Court does not believe this may be fairly characterized as the trial court's vouching for Norton's truthfulness. Moreover, if use of the questionnaire's references to Norton's plea and its "truthful testimony" requirement were proper, the trial judge's reading of this question to a prospective juror who forgot to fill in an answer is not improper.

The PCR court's denial of relief on these claims was not objectively unreasonable in light of pertinent U.S. Supreme Court precedent.

Jury Questionnaire and Commentary on the Evidence

Petitioner also contends that the jury questionnaire amounted to "a charge to the jury and a comment on the facts by the court" in violation of his right to due process of law and a fair trial guaranteed by the Sixth and Fourteenth Amendments.[FN9] (Dkt. 13 at 46; Dkt. 65 at 30-31.) In particular, he objects to portions of the questionnaire summarizing various background facts including Petitioner's arrest at the bank while attempting to use Juan Maya's identification to cash a check; his possession of personal items belonging to Maya; and the reference to the fact that Norton made statements to police incriminating Petitioner and Steven James. (Dkt. 65 at 30-31; *see also* Dkt. 14, Ex. 12 at 1-2.) Petitioner also cites a passage stating that the evidence would show Norton was involved in the crimes at issue. (Dkt. 65 at 31; *see also* Dkt. 14, Ex. 12 at 4 (Question No. 12).)

> FN9. Petitioner notes that the questionnaire states that prospective jurors should answer all questions "as if they were being asked by the Judge in open court." (Dkt. 14, Ex. 12 at 1.) Thus, he appears to reason that any comment on the facts in the questionnaire is tantamount to a comment on the facts by the court. (*See* Dkt. 65 at 30-31.)

Long ago, in *Quercia v. United States*, 289 U.S. 466, 470 (1933), the Supreme Court noted that the privilege of a trial judge to comment on the facts has "inherent limitations." The Court stated:

> In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided."

Id. at 470; *see Powell v. Galaza*, 328 F.3d 558, 564 (9th Cir.2003) (citing *Quercia* as controlling precedent for analyzing the proper limits on a trial judge's comments

to the jury).[FN10]

> FN10. Petitioner relies on the case of *United States v. Bland*, 697 F.2d 262, 263-66 (8th Cir. 1983); however, *Bland* is not controlling and is distinguishable because it involved a trial judge engaging in extensive questioning of a witness on behalf of the prosecution.

Even accepting Petitioner's assertion that the questionnaire's account of the background facts equated to a characterization of those facts by the trial court, Petitioner cannot establish a due process violation. Petitioner has not disputed the veracity of any of the facts he claims were improperly recounted in the questionnaire. Testimony at trial by Norton and others established these facts. Petitioner has not alleged, let alone explained, how any of the facts recounted in the questionnaire "distort or add" to the evidence presented at trial. *See Quercia*, 289 U.S. at 470. Thus, Petitioner cannot establish that the summary of the background facts in the questionnaire violates the "limitations" placed on a trial judge's comment on the facts outlined in *Quercia*, let alone establish that the recounting of these facts so infected the trial with unfairness that it rendered Petitioner's conviction a denial of due process. *See Darden*, 477 U.S. at 181. Therefore, the PCR court's denial of relief was not objectively unreasonable in light of applicable Supreme Court precedent and this claim will be denied.

B. CLAIMS OMITTED FROM MERITS BRIEF (CLAIMS 5, 8, 10, 12-15, 17, 23, 25-26, 31-36, 38 AND

40)

In a prior order addressing "procedural bar and other issues raised by Respondents' answer," the Court explicitly directed Petitioner to file a Merits Brief "limited to one hundred (100) pages, not including attachments, if any, addressing the merits of Claims 1-26, 31-36 and 38-41." (Dkt. 45 at 18.) The Court also permitted a Reply to Petitioner's response "limited to fifty (50) pages." (*Id.*) Instead of following these instructions, Petitioner filed a forty-one-page Merits Brief, which failed to discuss any aspect of Claims 5, 8, 10, 12-15, 17, 23, 25-26, 31-36, 38, and 40. Instead, Petitioner "reserved" the right to address these claims in a Reply Brief. (Dkt. 65 at 2.) Respondents contend that Petitioner's failure to discuss these claims in his Merits Brief constitutes a failure to comply with a previous order of the Court and, therefore, the Court should consider the claims as having been waived. (Dkt. 70 at 69-70.) Petitioner subsequently filed a 100-page "Reply Brief," in which he contested Respondents' contention these claims were waived and proceeded to brief most of these claims (with the exception of Claims 5, 8, and 23).

In following this procedure, Petitioner has utterly failed to comply with the clear directive of the Court and offered no explanation for his actions. His failure to brief all of his claims as directed limited Respondents' ability to address these claims. Because the claims were raised in the amended petition, the Court believes the sanction of waiver is too draconian. However, in light of the limited briefing provided, many of the claims must be addressed in an

abbreviated fashion.

Claim 5-Police Lacked Probable Cause to Stop Petitioner and the Subsequent Search and Seizure of Evidence Was Unreasonable

Petitioner alleges there was no probable cause for the search of his person and the car at the time of his arrest, which violated his Fourth Amendment right to be free from unreasonable searches. Petitioner contends the seizure of evidence found as a result of the searches should have been suppressed. (Dkt. 13 at 35.)

In *Stone v. Powell*, 428 U.S. 465, 494 (1976), the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial." Pursuant to *Stone*, a prerequisite for consideration of Petitioner's Fourth Amendment claim is the denial of the chance to fully and fairly litigate this claim in state court. Other than a self-serving and conclusory allegation in the Amended Petition that he did not have such an opportunity, Petitioner has presented nothing to support this proposition. This claim will be denied.

Claim 8-Right to the Same Judge Throughout State Court Proceedings

Petitioner contends that his right to due process of law and a fair trial under the Fifth and Sixth Amendments

was violated when a new judge was substituted during his state court proceedings. Petitioner does not explain how judicial substitution compromised his right to a fair trial. Review of the record indicates that the change of judge occurred on June 22, 1982, the day prior to commencement of trial. The new judge presided over the entire trial and also the sentencing. (*See* ROA, Vol. 1, Item 105 at 2.) Petitioner has cited no Supreme Court precedent holding that substitution of a new judge during state criminal proceedings is a per se violation of his federal due process rights. As a result, the denial of this claim by the PCR court was not a violation of clearly established federal law.[FN11] *See* *Musladin*, 127 S.Ct. at 654 (denying habeas relief in absence of clearly established federal law). This claim will be denied.

> FN11. Petitioner cites, without explanation of its applicability to his case, *Ross v. Reda*, 510 F.2d 1172 (6th Cir.1975). (*See* Dkt. 13 at 36.)

Claim 10-Trial Court Failed to Give a Cautionary Instruction About the Contingent Nature of Norton's Plea Agreement and the Unreliability of Accomplice Testimony

Petitioner contends that the trial court's failure, *sua sponte*, to instruct the jury "about the nature of Norton's contingent plea agreement and the risk that it created" violated his right to due process and a fair trial under the Sixth and Fourteenth Amendments. (Dkt. 13 at 36; Dkt. 83 at 56.) Petitioner argues that "[a]ccomplice testimony, like Martin Norton's, is 'inevitably suspect' and 'unreliable.' " (Dkt. 83 at 56.)

He contends that a cautionary instruction to this effect is necessary "where, as here, evidence other than the accomplice's testimony is weak." (*Id.*) While conceding that defense counsel did not request a cautionary instruction, Petitioner asserts that the state court should have done so *sua sponte,* because "[t]he State's case depended upon [the witness's] credibility." (*Id.* at 57.)

In Arizona, special instructions regarding the unreliability of accomplice testimony are prohibited as improper comment on the evidence. *State v. Bussdieker,* 127 Ariz. 339, 342, 621 P.2d 26, 29 (1980) ("[I]t is not the law in Arizona that the jury should be instructed to regard (an accomplice's) testimony with distrust.... Our most recent cases have made it clear that a cautionary instruction of this type is a comment on the evidence ...") In light of *Bussdieker,* Arizona law prohibited the trial court from giving "cautionary" instructions about the unreliability of a witness, even an accomplice. Unless the holding in *Bussdieker* is contrary to Supreme Court precedent, Petitioner's claim is without merit.

Petitioner cites several circuit court of appeals cases holding that failure to give an accomplice instruction is reversible error if requested by the defense and if "that testimony is important." *See, e.g., United States v. Bernard,* 625 F.2d 854, 857 (9th Cir .1980). However, none of these cases support the proposition that a state court's failure to give such an cautionary instruction, *sua sponte,* violates federal due process. More importantly, Petitioner does not cite any clearly established Supreme Court law governing this claim;

therefore, he cannot obtain habeas relief. *Musladin*, 127 S.Ct. at 654 (denying habeas relief in absence of clearly established federal law).

Claims 12-15

Aggravated Robbery (Claim 12)

Petitioner contends that the trial court's failure to instruct the jury "that a specific intent to *permanently* deprive another of property is an element of robbery violated [his] rights to due process and a fair trial under the Sixth, Eighth and Fourteenth Amendments." (Dkt. 83 at 35 (emphasis added).) He argues that the instruction given "falls far short of the required specific intent instruction" because it only defined the term "with intent" to mean "a person's objective is to cause the result." (*Id.* at 35-36.)

A.R.S. § 13-1902(A) defines robbery as follows:

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistence to such person taking or retaining property.

In addition, A.R.S. § 13-1903(A) provides:

> A person commits aggravated robbery if in the course of committing robbery as defined in § 13-1902, such person is aided by one or more accomplices actually present.

The trial court instructed the jury that the elements of aggravated robbery required a showing that "1) The defendant took another's property; and 2) The taking was against the other person's will; and 3) The defendant threatened or used force against any person with the intent to force surrender of the property or to prevent resistance to the taking or keeping the property; and 4) The defendant was aided by an accomplice." (RT 6/30/82 at 41.) The court further instructed the jury that "the term 'with the intent' or 'intended' means that a person's objective is to cause that result or to engage in that conduct." (*Id.* at 43.)

When a particular jury instruction is challenged, the question is whether the erroneous instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). The Court must consider the jury instruction at issue in the context of the whole charge given the jury. *See id.* at 146-47; *Francis v. Franklin*, 471 U.S. 307, 315 (1985). This Court must assess " 'whether there is a reasonable likelihood that the jury applied the challenged instruction in a way' that violates the Constitution." *Estelle*, 502 U.S. at 72. Due Process requires that the state prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Sandstrom v. Montana*, 442 U.S. 510, 520-21 (1979).

Petitioner's allegation is that the aggravated robbery instruction relieved the prosecution of the burden of proving specific intent beyond a reasonable doubt. Upon review, the Court believes Petitioner has not established that the trial court's instructions on

robbery were in error. The instructions given tracked the statutory definitions for robbery and aggravated robbery provided in A.R.S. §§ 13-1902 and 13-1903. Moreover, because the specific intent to *permanently* deprive Petitioner of his property was not at issue in this case, the court was not required to instruct the jury that Petitioner had to manifest such a specific intent. *See State v. Gomez*, 102 Ariz. 432, 434, 432 P.2d 444, 446 (1967) (holding that failure to give specific intent instruction on need to *permanently* deprive a person of his property is not required unless such an intent is at issue, as when the defendant asserts he did not intend to deprive the owner of his property permanently or when he alleges "he took the property with the uncoerced consent of the victim.") As a result, Petitioner cannot show that the instruction given "so infected the entire trial that the resulting conviction violates due process." *See Estelle*, 502 U.S. at 72; *Cupp*, 414 U.S. at 147. Thus, the PCR court's denial of relief was not objectively unreasonable under controlling Supreme Court law and this claim will be denied.

Kidnapping (Claim 13)

Petitioner next contends that kidnapping was not a proper predicate offense for felony murder "because '[t]he felony murder doctrine does not apply where the felony is an offense included in the charge of homicide.' " (Dkt. 83 at 34 (citing *State v. Essman*, 98 Ariz. 228, 235, 403 P.2d 540, 545 (1965).) He argues that the trial court permitted the jury to find him guilty of felony murder "on the basis of an offense included in the charge of murder: restraining a person's movements

with the intent to inflict death." (Dkt. 83 at 34.) In other words, according to Petitioner, "[t]he acts of kidnapping, restraint with the intent to inflict death, merge into the resultant homicide and cannot support a separate offense of felony murder." (*Id.* at 35.)

The court gave the following instruction regarding the crime of kidnapping:

> The crime of Kidnapping requires proof that *the defendant knowingly restrained another person with the intent to inflict death or physical injury on the victim.* Restrain means to restrict a person's movements without consent or without legal authority in any manner which interferes substantially with such person's liberty, by moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by physical force or intimidation. If you determine beyond a reasonable doubt that the crime of Kidnapping occurred, you should then determine if the offense is a dangerous offense or a non-dangerous offense.

(RT 6/30/82 at 42 (emphasis added).)

Upon review, the Court does not believe that the trial court's instruction was erroneous. In *State v. Lewis*, 169 Ariz. 4, 816 P.2d 263 (Ct.App.1991), the Arizona Court of Appeals explicitly held that kidnapping is a proper predicate offense for felony murder under Arizona law. *See also* A.R.S. § 13-1105(A)(2) (listing kidnapping as a predicate felony for first degree felony murder). In *Lewis,* as in this case, the trial court

instructed, *inter alia,* that to support a kidnapping charge, restraint of the victim's movements had to be "with the intent to inflict death or physical injury on the person." 169 Ariz. at 6, 816 P.2d at 265. In rejecting Lewis's argument (now urged here), the court stated, "we can conceive of many situations in which a homicide is unaccompanied by even a slight restraint." *Id.; see also State v.. Villafuerte,* 142 Ariz. 323, 327, 690 P.2d 42, 46 (1984) ("With substantial evidence on the kidnapping charge, a finding of guilt on the felony murder charge could directly follow.") Because the kidnapping offense requires restraint, which is not required for the murder, the underlying felony does not merge into the homicide. *Cf. Blockburger v. United States,* 284 U.S. 299, 304 (1932) (for purposes of punishment, the test is whether each offense "requires proof of a fact which the other does not.")

Under Arizona law, kidnapping is a proper predicate offense for felony murder that does not merge into the homicide. Petitioner has not demonstrated that the PCR court's denial of this claim was objectively unreasonable under clearly established Supreme Court law. Therefore, the claim will be denied.

Felony Murder (Claim 14)

Petitioner contends that because his conviction for aggravated robbery was flawed, and because the crime of kidnapping was not a proper predicate offense for felony murder, he could not constitutionally have been convicted of felony murder. (Dkt. 13 at 37-38; Dkt. 83 at 59.) Because the Court concludes that the robbery instruction was not in error and the trial court's

determination that kidnapping was a proper predicate offense to felony murder was also not error, this claim is without merit.

Theft (Claim 15)

Petitioner next challenges his theft conviction. He contends that this conviction "violated his rights under the Sixth and Fourteenth Amendments because there was no evidence of the required element that the alleged stolen property's value exceed $100." (Dkt. 13 at 38.)

Due process requires that the state prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364; *Sandstrom*, 442 U.S. at 520-21. Here, the trial court instructed the jury on the $100 monetary requirement. (RT 6/30/82 at 42-43.) Although no evidence of the precise value of any of the property found in Petitioner's possession was presented at trial, "[s]uch testimony is not always necessary if value may be inferred from other evidence and the item is not something so unique as to require expert testimony as to its value." *State v. Blankenship*, 127 Ariz. 507, 511-12, 622 P.2d 66, 70-71 (Ct.App.1980).

Evidence was presented at trial establishing Petitioner possessed the victim's property, including checks, clothes, and a car (for which title was signed over to Petitioner). Although no dollar value was placed on the property, Daniel McIntosh testified that Petitioner told him he bought the car for $500. McIntosh testified that he thought the car was too nice to be worth only $500. (RT 6/28/82 at 8, 38.) Testimony was also presented

that the car was a seven-year old Thunderbird, with a nice interior, a stereo, and power windows. Based on this evidence, the jury could reasonably have inferred the value of the car alone surpassed $100. For these reasons, Petitioner's due process claim is without merit.

Claim 17-Trial Court Should Have Granted a New Trial Based on Expert Evidence that Petitioner Could Not Have Premeditated the Crimes

Petitioner contends that the trial court received evidence prior to sentencing, via the reports of George Dee, Ph.D. and Paul Bindelglas, M.D., that raised doubts as to whether he could have premeditated the crime. He contends that the court's failure to grant a new trial, *sua sponte,* based on this evidence violated his right to due process and a fair trial under the Sixth and Fourteenth Amendments. (Dkt. 13 at 38; *see also* Dkt. 83 at 68-71.)

Both Dr. Dee and Dr. Bindelglas filed reports on Petitioner's mental state just prior to the mitigation hearing in October 1982. Dr. Dee indicated that Petitioner had defective judgmental function, impulsivity and flattening affect, and immaturity and poor social adjustment. (Dkt. 70, Ex. E at 3.) He further opined, "It is not likely that [Petitioner] has planned any of his misadventures but is more apt to have responded impulsively and got carried away with what's happening at the time." (*Id.*)

In his report, Dr. Bindelglas opined that Petitioner's "judgemental [sic] functioning is markedly impaired

and he has impulsive tendencies. He also has depressive paranoid features." He stated he did not know if Petitioner's impulsiveness "is a characterological defect or is related to any organic deficit due to two [concussions]," but noted that a CAT scan was negative. (*See* Dkt. 70, Ex. D at 3.) He did not believe Petitioner acted with premeditation because "[h]e is much too impulsive for that." (*Id.*)

Petitioner cites no Supreme Court precedent to support the specifics of this claim. Instead he relies on *Beck*, *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), and *Gardner v. Florida*, 430 U.S. 349 (1977), for general bromides about due process requiring a full and fair trial, which he asserts is denied if "evidence central to any reliable decision on whether Petitioner premeditated the murder was not heard by the jury." (Dkt. 83 at 70.) None of the cases cited by Petitioner address anything like the claim he now raises, nor can anything in those cases be reasonably construed to support his claim that the sentencing court violated due process when it failed, *sua sponte*, to order a new trial based on the findings of Drs. Dee and Bindelglas.

In addition, although Arizona permits expert testimony to establish personality traits such as the trait of acting impulsively or without reflection, Arizona does not permit expert testimony "specifically as to whether a defendant was acting reflectively *at the time of the killing*." *State v. Rivera*, 152 Ariz. 507, 514, 733 P.2d 1090, 1097 (1987) (quoting *State v. Christensen*, 129 Ariz. 32, 35-36, 628 P.2d 580, 583-84 (1981); *see also State v. Ortiz*, 158 Ariz. 528, 533, 764 P.2d 13, 18 (1988); *State v. Arnett*, 158 Ariz. 15, 22, 760 P.2d 1064,

1071 (1988) (trial court properly excluded expert testimony where "proposed testimony did not show a character trait of impulsivity, but instead was testimony of defendant's probable state of mind at the time the offense occurred.") Thus, Drs. Dee and Bindelglas could only have testified at trial that Petitioner had general tendencies or character traits causing him to act impulsively. They could not have testified Petitioner was incapable of acting reflectively at the time of the crime.

When weighed against the evidence of premeditation presented at trial through the testimony of accomplice Martin Norton, the Court believes any testimony that Petitioner had a personality trait that caused him to act impulsively would not likely have resulted in his acquittal on the first degree murder charge. This view is reinforced by the fact that the trial court also instructed the jury on first degree felony murder, for which premeditation is not an element. *See Tucker*, 205 Ariz. at 167, 68 P.3d at 120. For all these reasons, Petitioner's conclusory assertion that the sentencing court violated his right to due process of law when it failed, *sua sponte*, to order a new trial based on the reports of Drs. Dee and Bindelglas, is without merit.

Claim 23-Trial Court Improperly Considered Petitioner's Refusal to Admit Guilt as an Aggravating Factor

Petitioner next asserts that the sentencing court improperly treated his refusal to admit guilt (outlined in the Presentence Report) as an aggravating factor. (Dkt. 13 at 40.) Arizona law requires that "the trial

court may give aggravating weight only to the evidence which tends to establish the aggravating circumstances specifically enumerated in A.R.S. § 13-703(F)." *See State v. Atwood*, 171 Ariz. 576, 673, 832 P.2d 593, 656 (1993), *overruled on other ground by State v. Nordstrum*, 200 Ariz. 229, 25 P.3d 717 (2001). Absent proof to the contrary, the trial judge is presumed to focus on the relevant sentencing factors and set aside "the irrelevant, the inflammatory, and the emotional factors." *Id.* at 674, 832 P.2d at 658. In light of Petitioner's failure to provide specifics in his Merits or Reply Brief and the fact that nothing in the sentencing transcripts indicates the court considered Petitioner's failure to admit guilt as an aggravating factor in imposing a death sentence, this claim is without merit and will be denied.

Claim 25-Sentencing Court Improperly Found the "Heinous, Cruel and Depraved" Aggravating Circumstance

Petitioner next asserts the Arizona Supreme Court erroneously concluded that the "heinous, cruel and depraved" aggravating circumstance was established beyond a reasonable doubt. In *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990), the Supreme Court held that the appropriate standard of federal habeas review of a state court's application of an aggravating circumstance is the "rational factfinder" standard; i.e., "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating factor to exist. *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Based on the factual findings made by the Arizona Supreme Court, *see* *Libberton*, 141 Ariz. at 139-40, 685 P.2d at 1291-92, a rational finder of factor could have found the existence of the especially heinous, cruel or depraved aggravating factor. This claim will be denied.

Claim 26-Sentencing Court's Aggravation Finding that Petitioner Committed the Murder for Pecuniary Gain Repeats an Element of the Underlying Crime of Felony Murder

Petitioner alleges it was improper for the trial court to find the pecuniary gain aggravating factor because it "repeats an element of the underlying crime of felony murder." (Dkt. 13 at 41.) To support this assertion, Petitioner merely cites *Lowenfeld v. Phelps*, 484 U.S. 231 (1988). The Court has reviewed *Lowenfeld* and believes nothing in it prohibits state courts from using the pecuniary gain aggravating factor to support a death sentence based on a felony murder conviction where, as in this case, one of the underlying crimes is armed robbery. *Id.* at 241-46.

Petitioner also contends that this aggravating factor was not proved beyond a reasonable doubt. (Dkt. 13 at 41.) The Court concludes that a rational fact finder could have found this factor to exist. *See* *Lewis*, 497 U.S. at 781. This claim will be denied.

Claim 31-Arizona Courts Applied an Unconstitutional Standard in Finding Petitioner Death Eligible

Petitioner alleges the trial court made no finding that Petitioner was death eligible under *Enmund v. Florida*,

458 U.S. 782 (1982). (Dkt. 83 at 71.) Further, he contends that his death sentence is invalid because the Arizona Supreme Court's *Enmund* finding was not supported by the record. (Dkt. 13 at 43.)

In *Enmund*, the Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty "in the absence of proof [a defendant] killed or attempted to kill, and regardless of whether [he] intended or contemplated that life would be taken." 458 U.S. at 801. On appeal, the Arizona Supreme Court noted that the trial court failed to make an *Enmund* finding in imposing the death sentence. *See Libberton*, 141 Ariz. 136, 685 P.2d at 1288. The court then reviewed the record and concluded that the evidence established beyond a reasonable doubt that Petitioner intended to kill Maya. *Id.* at 136-37, 685 P.2d at 1288-89.

The Supreme Court holds that an *Enmund* finding is not required to be made by the trial court; rather, it is sufficient if the finding is made at any point in the state court process, including on appeal. *Cabana v. Bullock*, 474 U.S. 376, 386-87 (1986), *abrogated on other grounds by Pope v. Illinois*, 481 U.S. 497, 503 n. 7 (1987). On habeas review, a state court's findings regarding *Enmund* are factual determinations which are presumed correct and which Petitioner "bears the heavy burden of overcoming." *Id.* at 377-78. Petitioner must rebut this presumption of correctness with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (petitioner bears the burden of overcoming by "clear and convincing evidence" the presumption of correctness applicable to a state court's factual

determinations); *Revilla v. Gibson*, 283 F.3d 1203, 1211 (10th Cir.2002) (same).

Petitioner fails to rebut the Arizona Supreme Court's *Enmund* finding with clear and convincing evidence. Therefore, the PCR court's denial of post-conviction relief on this issue was not objectively unreasonable in light of *Enmund*. Further, there is sufficient evidence from which a rational fact-finder could find that Petitioner intended to kill Maya. *See Jackson*, 443 U.S. at 319 (evidence is sufficient if looked at "in the light most favorable to the prosecution, *any* rational trier of fact" could have made the finding beyond a reasonable doubt). As recounted by the Arizona Supreme Court, evidence showed Petitioner agreed at the trailer with James that Maya had to be killed, agreed to hide Maya's body in a mine shaft, pointed a gun at Maya on the trip to Salome and threatened to shoot Maya if he made any noise when they were stopped by a patrolman, beat Maya's head with rocks at the murder site, and attempted to shoot Maya in the head at close range while Maya lay on the ground. *Libberton*, 141 Ariz. at 136-37, 685 P.2d at 1288-89;*see also* RT 6/28/82 at 26, 27, 28-31, 38-42. Petitioner's claim will be denied.

Claims 32, 33 and 35-Constitutionality of the Death Penalty

In Claim 32, Petitioner asserts that the Arizona death penalty is imposed discriminatorily against poor, young, and male defendants. (Dkt. 13 at 43.) Petitioner "has the burden of proving 'the existence of purposeful discrimination.' " *McCleskey v. Kemp*, 481 U.S. 279,

292 (1987). Absent a showing that the sentencing court "acted with discriminatory purpose," Petitioner cannot prevail on this claim. *See id.* Because Petitioner has provided no evidence to support an allegation of purposeful discrimination against him based on his poverty, youth, or gender, this claim will be denied.

In Claim 33, Petitioner asserts that "arbitrary application of the death penalty in [his] case amounts to cruel and unusual punishment." (Dkt. 13 at 43.) Petitioner provides no factual or legal support for this cursory assertion, which is insufficient to establish entitlement to habeas relief.

In Claim 35, Petitioner contends the "death sentence as actually imposed in the State of Arizona ... and in this case, serves no purpose of deterrence or retribution and constitutes purposeless infliction of pain and suffering unjustified by any valid state interest in violation of the Eighth and Fourteenth Amendments." (Dkt. 13 at 44.) Petitioner cites no authority to support this claim. His political or philosophical argument against the existence of the death penalty is not a sufficient basis for habeas relief.

Claims 34 and 38-Cumulative Error at Trial, Sentencing and Appeal

Petitioner contends that the "numerous failings of trial counsel, the errors made by the court and the instances of prosecutorial misconduct .... taken together ... deprived [him] of his right to a fair trial and a fair sentencing." (Dkt. 13 at 44, 45; Dkt. 83 at 92-93.)

For the reasons stated in addressing each of Petitioner's properly exhausted claims, the Court believes that none warrant habeas relief. Attempting to argue a "cumulative" effect will not surmount these findings. For the reasons previously stated in the Court's analysis, Petitioner's claims fail either as a matter of law and/or because he cannot establish that any alleged error would likely have resulted in a different outcome at the guilt or sentencing stage of trial.

Claim 40-Death Qualification of the Jury

Petitioner asserts that the "death qualification" in the questionnaire "served no legitimate purpose" and "biased and prejudiced the jury," thereby denying him an impartial jury in violation of his Sixth and Fourteenth Amendment rights.[FN12] (Dkt. 13 at 45-46.)

> FN12. The questionnaire explained that if Petitioner was found guilty of first degree murder the court would be required to impose a sentence of life imprisonment or the death penalty. The questionnaire then asked about the potential jurors' attitudes toward the death penalty-e.g., "Because of conscientious or religious scruples or feelings you may have against the death penalty, would you find it impossible to return a verdict of guilty to first degree murder?" (Dkt. 14, Ex. 12 at 3.)

Petitioner cites no authority to support his contention that "death qualifying" prospective jurors violates his constitutional rights. Conversely, in *Lockart v.*

McCree, 476 U.S. 162, 173 (1986), the Supreme Court held that "the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." The PCR court's denial of relief on this claim was not objectively unreasonable under clearly established Supreme Court precedent.

C. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Claims 18, 19 and 39 of the amended petition allege ineffective assistance of counsel ("IAC") at trial, at sentencing, and on appeal, respectively. Because Petitioner seeks to support his IAC claims with documents that are not part of the state court record, the Court first considers Petitioner's requests to expand the record. Petitioner's requests for an evidentiary hearing will be considered within the discussion of the merits of the particular claims.

Standards for an Evidentiary Hearing and Expansion of the Record

Evidentiary Hearing

Historically, the district court has considerable discretion to hold an evidentiary hearing to resolve disputed issues of material fact. *See Townsend v. Sain*, 372 U.S. 293, 312, 318 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), *and limited by* § 2254(e)(2); *Baja v. Ducharme*, 187 F.3d 1075, 1077-78 (9th Cir.1999); Rule 8, Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (providing that the district court judge shall determine if an evidentiary

hearing is required). That discretion is significantly circumscribed by § 2254(e)(2) of the AEDPA. *See Baja*, 187 F.3d at 1077-78.

Section 2254 provides that:

> *If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that*
>
> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added). The Supreme Court has interpreted subsection (e)(2) as precluding an evidentiary hearing in federal court if the failure to develop a claim's factual basis is due to a "lack of diligence, or some greater fault, attributable to the prisoner or prisoner's counsel." *Williams*, 529 U.S. at 432. A hearing is not barred, however, when a

petitioner diligently attempts to develop the factual basis of a claim in state court and is "thwarted, by example, by the conduct of another or by happenstance was denied the opportunity to do so." *Id.*; *see* Baja, 187 F.3d at 1078-79 (allowing hearing when state court denied opportunity to develop the factual basis of claim).

When the factual basis for a particular claim has not been fully developed in state court, the district court must first determine whether the petitioner was diligent in attempting to develop the factual record. *See* Baja, 187 F.3d at 1078 (quoting *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir.1998)). The diligence assessment is an objective one, requiring a determination of whether a petitioner "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams*, 529 U.S. at 435. For example, when there is information in the record that would alert a reasonable attorney to the existence and importance of certain evidence, the attorney fails to develop the factual record if he does not make reasonable efforts to sufficiently investigate and present evidence to the state court. *See id.* at 438-39, 442; *Alley v. Bell*, 307 F.3d 380, 390-91 (6th Cir.2002) (lack of diligence because petitioner knew of and raised the claims in state court, but failed to investigate all the factual grounds for such claims).

Absent unusual circumstances, diligence requires that a petitioner "at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437; *see Bragg v.*

Galaza, 242 F.3d 1082, 1090 (9th Cir.) (finding no diligence because petitioner neither requested an evidentiary hearing in the trial court nor filed a state habeas petition), *amended on denial of reh'g*, 253 F.3d 1150 (9th Cir.2001). The mere request for an evidentiary hearing, however, may not be sufficient to establish diligence if a reasonable person would have taken additional steps. *See Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir.2000) (failed to present affidavits of family members that were easily obtained without court order and with minimal expense); *see also McNair v. Campbell*, 416 F.3d 1291, 1299-1300 (11th Cir.2005) (no development of evidence available though petitioner, family members, and medical literature, and no appeal of denial of funds and hearing); *Cannon v. Mullin*, 383 F.3d 1152, 1177 (10th Cir.2004) (lack of diligence if petitioner does not proffer "evidence that would be readily available if the claim were true."); *Koste v. Dormire*, 345 F.3d 974, 985-86 (8th Cir.2003) (no effort to develop the record or assert any facts to support claim).

In sum, if the Court determines that a petitioner has not been diligent in establishing a factual basis for his claims in state court, then the Court may not conduct a hearing unless the petitioner satisfies one of § 2254(e)(2)'s narrow exceptions. If, however, the petitioner has not failed to develop the factual basis of a claim in state court, the Court will the proceed to consider whether a hearing is appropriate or required under the criteria set forth by the Supreme Court in *Townsend*. 372 U.S. 293;*see Baja*, 187 F.3d at 1078 (quoting *Cardwell*, 152 F.3d at 337);*Horton v. Mayle*, 408 F.3d 570, 582 n. 6 (9th Cir.2005).

Pursuant to *Townsend,* a federal district court must hold an evidentiary hearing in a § 2254 case when: (1) the facts are in dispute; (2) the petitioner "alleges facts which, if proved, would entitle him to relief;" and (3) the state court has not "reliably found the relevant facts" after a "full and fair evidentiary hearing," at trial or in a collateral proceeding. *Townsend,* 372 U.S. at 312-13; *Hill v. Lockhart,* 474 U.S. 52, 60 (1985) (upholding the denial of a hearing when petitioner's allegations were insufficient to satisfy the governing legal standard); *Bashor v. Risley,* 730 F.2d 1228 (9th Cir.1984) (hearing not required when claim must be resolved on state court record or claim is based on non-specific conclusory allegations). In addition, the Court established six circumstances under which there is presumptively, no "full and fair hearing" at the state level:

(1) the merits of the factual dispute were not resolved in the state hearing;

(2) the state factual determination is not fairly supported by the record as a whole;

(3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequate developed at the state-court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Townsend, 372 U.S. at 313. In any other case in which diligence has been established, the district court judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." *Id.* at 318 (noting that if a "habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, [the judge] may, and ordinarily should, accept the facts as found in the hearing.").

Expansion of the Record

Rule 7 of the Rules Governing Section 2254 Cases authorizes a federal habeas court to expand the record to include additional material relevant to the petition. Rule 7 provides: "The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath, to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record." Rule 7(b), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. The purpose of Rule 7 "is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing." Advisory Committee Notes, Rule 7, 28 U.S.C. foll. § 2254; *see also Blackledge v. Allison*, 431 U.S. 63, 81-82 (1977). Any time expansion of the record is sought, the Court must assess whether the material submitted are

relevant to resolution of the petition.

Section 2254(e)(2), as amended by the AEDPA, limits a petitioner's ability to present new evidence through a Rule 7 motion to expand the record to the same extent it limits the availability of any evidentiary hearing. *See Cooper-Smith v. Palmateer*, 397 F .3d 1236, 1241 (9th Cir.2005) (applying § 2254(e)(2) to expansion of the record when intent is to bolster the merits of a claim with new evidence) (citing *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam). Thus, when a petitioner seeks to introduce new affidavits and other documents never presented in state court, for the purpose of establishing the factual predicate of a claim, he must either demonstrate diligence in developing the factual basis in state court or satisfy the requirements of § 2254(e)(2)(A) & (B). However, when a petitioner seeks to expand the record for other reasons, such as to cure omissions in the state court record, *see Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (per curiam), establish cause and prejudice, or demonstrate diligence, the strictures of § 2254(e)(2) do not apply. *See Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir.2001).

Expansion of the Record Analysis

Petitioner has presented several depositions and one affidavit which were not presented in his state PCR proceedings. In particular, he relies on the 1992 depositions of George Dee (psychologist), George S. Lim (Petitioner's trial attorney) and Henry Dean (an officer who guarded Petitioner during the time Petitioner was on work furlough just prior to the crime), and a 1993 affidavit of prosecution trial witness Daniel McIntosh.

(Dkt.14, App., Exs.4, 11, 23.) Petitioner contends that his failure to present these materials in state court was not due to a lack of diligence on his part but, rather, the PCR court's denial of an evidentiary hearing and funds to conduct discovery. (Dkt. 83 at 15-16.) As an additional matter, Respondents contend a 1991 affidavit from Martin Norton, attached in support of Petitioner's 1994 PCR petition (*id.*, Ex. 7), is not properly part of the habeas record and should not be considered by this Court.

Dee Deposition

Petitioner seeks to expand the record to include a November 9, 1992 deposition of Dr. Dee. Dr. Dee examined Petitioner just prior to the mitigation hearing on October 20, 1982. In his report of that examination, Dr. Dee presented the following diagnoses and opinions concerning Petitioner's mental state:

1. Defective judgmental functioning.

2. Impulsivity and flattening of affect.

3. Poor reality contact.

4. Chronic depression, likely originating at about age 8 or 9.

5. Immaturity and poor social adjustment.

6. It is not likely that he has planned any of his misadventures but is more apt to have responded

impulsively and got carried away with what's happening at the time.

7. He places distance not really relating to the trouble he is in what has happened, and doesn't learn from experience.

8. There are problems concerning sexual identity, as there is only a superficial role identity.

9. Conflict over sexual identity confusion needs to be denied and avoided to maintain feelings of adequacy.

10. There are severe emotional problems and have been for years.

11. Without intensive treatment he would be like a time bomb waiting to go off.

12. There are unresolved issues concerning father.

(Dkt. 70, Ex. E at 3.)

In support of his third PCR petition, filed in 1987, Petitioner included an affidavit from Dr. Dee. The affidavit reiterates many of the findings in the 1982 report concerning Petitioner's mental state, including Dr. Dee's belief that Petitioner has a "general tendency" to react impulsively and reflexively and his opinion that because of this characteristic, Petitioner's participation in Maya's killing was likely not premeditated. Dr. Dee also states his belief that Petitioner's "youth and consequent immaturity ... was a factor in this killing," and that Petitioner was just

"go[ing] along" in Maya's murder. (Dkt. 26, Attach., Ex. 2 at 2.)

Petitioner now presents the November 9, 1992 Dee deposition to support his claims that counsel was ineffective at both the guilt and sentencing stages. As noted, the record already contains Dr. Dee's 1982 report and 1987 affidavit. The 1992 deposition again touches on Dr. Dee's findings concerning Petitioner's mental state-in particular, his opinion that Petitioner has a tendency to act impulsively or reflexively rather than to premeditate.

Depositions involve expense, and the denial of funds to conduct discovery in state court was not Petitioner's fault because the PCR court summarily denied relief on this and other claims without acting on Petitioner's request for funds to pursue discovery. (*See* Dkt. 26, Attach. at 65; ROA-PCR, Vol. 1 of 1, ME 2/10/88 at 1). In light of this denial, Petitioner's diligence in presenting Dee's affidavit in his 1987 PCR petition, and the fact that the deposition contains similar opinions to those presented in state court, the Court finds that Petitioner was diligent with respect to Dr. Dee's deposition. Therefore, Petitioner's request to include this deposition in the record will be granted and the deposition will be considered to the extent it is relevant to Petitioner's IAC claims.

Lim Deposition

In contrast, the Court believes Petitioner was not diligent in obtaining trial attorney George Lim's deposition. Although the Court permitted Petitioner to

depose Lim while Petitioner's previous habeas petition was pending in this Court, Respondents registered an objection to its admissibility in light of the fact that Petitioner made no effort to introduce this evidence in support of the IAC claims presented in his 1987 PCR petition. (*See Libberton I,* Dkt. 148 at 5 n. 2.) They renew that objection now. (Dkt. 70 at 10.)

Petitioner asserts that he was denied funds to conduct discovery in support of his 1987 PCR petition and was not able to depose Lim until the district court allowed him funds. (Dkt. 83 at 17.) Upon review, the Court believes this excuse does not support Petitioner's claim of due diligence in obtaining evidence from Lim. Petitioner presented numerous affidavits in support of his 1987 PCR claims, yet the record is devoid of any attempt by Petitioner to obtain evidence from his own trial attorney. Petitioner did not file an affidavit from Lim and he has not indicated that obtaining an affidavit would have been cost-prohibitive. Petitioner was able to obtain affidavits from several other individuals without a grant of funds to conduct discovery. Lim was obviously well known to Petitioner. His claim of a lack of funds is unpersuasive and insufficient to establish due diligence. The record is devoid of any evidence Petitioner made an effort to contact Lim to obtain information from him until he deposed him in 1992, more than a decade after trial. For this reason, Petitioner's request to expand the record to include Lim's deposition will be denied.

Dean Deposition

Petitioner also seeks to expand the record to include

the 1992 deposition of Henry Dean. Dean was a detention officer at the County Jail while Petitioner was in custody during the period leading up to Maya's murder. Petitioner presents Dean's deposition to support his claim that counsel was ineffective at sentencing in regard to presenting mitigation evidence relating to his history of substance abuse. Specifically, he contends the deposition shows that Dean could have provided evidence that Petitioner "was subject to personality changes that fellow inmates attributed to [his] drug use ." (Dkt. 65 at 17; *see also* Dkt. 14, App., Ex. 23.)

Petitioner attempted to obtain information from Dean in support of his 1987 PCR petition. In particular, Petitioner filed an affidavit from Carole Larsen-Harper, a paralegal from Petitioner's counsel's law firm, who interviewed Dean on March 10, 1987. The affidavit was filed in support of Petitioner's 1987 PCR petition. (*See* Dkt. 26, Attach., Ex. 12.) Petitioner provides no explanation as to why Larsen-Harper was able to locate and interview Dean at that time, but not present an affidavit from him. Nevertheless, in light of the efforts made at that time to obtain evidence from Dean, and the fact that the PCR court denied Petitioner funds to conduct discovery, the Court concludes Petitioner was diligent in obtaining evidence from Dean. Petitioner's request to include Dean's 1992 deposition in the record will be granted and the deposition will be considered to the extent it is relevant to Petitioner's IAC claims.

McIntosh Affidavit

Petitioner seeks to expand the record to include a 1993 affidavit from Daniel McIntosh. McIntosh's affidavit recounts that he and Petitioner were long-time drug users, that they both sold drugs to support their habits, and that they "took drugs and drank nightly for the five or six days prior to and through November 16, 1981." (Dkt. 14, App., Ex. 6 at 1.) Petitioner also contends that the affidavit supports "defense arguments that co-defendant James had a violent, dominant, and explosive personality and was the 'leader' primarily responsible for the victim's death." (Dkt. 83 at 26.)

Again, Petitioner argues that he was unable to present McIntosh's affidavit prior to this Court granting him discovery in 1992. (*See Libberton I,* Dkt. 124.) Again, the Court disagrees. Since his direct appeal, Petitioner has been arguing that he merely followed accomplice Steven James's direction in murdering Maya. *See* Libberton, 141 Ariz. at 140, 685 P.2d at 1292. Petitioner raised a similar argument in his 1987 PCR petition, asserting, *inter alia,* that counsel was ineffective at both the guilt and sentencing stages for not investigating this theory. (Dkt. 26, Attach. at 12-14, 18-19.)

The Court notes that Petitioner was able to attach affidavits to his 1987 PCR petition from two other persons, Diane Hodge and Daniel Severance, to support this claim. (Dkt.26, Attach., Exs.6, 7.) Nothing in the record indicates Petitioner attempted to obtain an affidavit from McIntosh in support of his 1987 PCR petition, yet McIntosh was well-known to Petitioner. They went to school together and Petitioner had known

him for years. (RT 6/28/82 at 25.) Petitioner provides no explanation for failing to obtain McIntosh's affidavit in support of his 1987 PCR petition, nor has he alleged that, unlike the other affidavits he did obtain at that time, interviewing McIntosh and obtaining his affidavit would have been cost prohibitive. *See* *Dowthitt*, 230 F.3d at 758 (holding that lack of funding to obtain evidence from family members does not establish due diligence where no evidence is presented that obtaining the affidavits would have been cost prohibitive). The Court believes Petitioner was not diligent in developing the record with respect to McIntosh's 1993 affidavit and expansion of the record to include this affidavit will be denied.

Norton Affidavit

Petitioner attached Martin Norton's 1991 affidavit to his fourth PCR petition filed in 1994, twelve years after he was convicted. Petitioner presented the affidavit at that time to support his claim that permitting Norton to testify pursuant to a plea agreement containing a "consistency clause" is inherently unreliable and violative of due process. Because the PCR court considered the affidavit with respect to the claims raised in the 1994 petition, the affidavit is properly part of the record with respect to those claims.

Petitioner seeks to use the affidavit to support his IAC claims. (*See* Dkt. 83 at 21.) However, because Petitioner never presented this affidavit in state court to support any claims of IAC at trial and/or sentencing, consideration of the affidavit as to those claims is not

appropriate unless expansion of the record is granted. As previously noted, Petitioner has alleged as far back as his direct appeal that accomplice James was more culpable, that James was extremely violent and the main impetus in the murder of Maya, and that James effectively overbore Petitioner's will and forced him to go along in the crimes. *See Libberton*, 141 Ariz. at 140, 685 P.2d at 1292. Petitioner reiterated this theory in his 1987 PCR petition, alleging counsel was ineffective because he failed to discover readily available evidence to support this claim. (*See* Dkt. 26, Attach. at 11, 12-14.) Again, Petitioner presented affidavits from others, including Diane Hodge and Daniel Severance, to support claims raised in that petition despite the state court's failure to grant funds to conduct discovery. (*See* Dkt. 26, Attach., Exs. 6, 7.) Yet the record is devoid of even a claim by Petitioner that he attempted to speak to Norton and obtain an affidavit from him prior to 1991. Petitioner presents no evidence that interviewing Norton and obtaining his affidavit in 1987 would have been cost-prohibitive. Cost did not prevent him from obtaining other affidavits to support the claims raised in his 1987 petition, nor did it prevent him from eventually obtaining Norton's affidavit. Thus, his claim of a denial of funds is not sufficient to excuse his failure to present evidence from Norton in support of the claims raised in his 1987 petition. *See Dowthitt*, 230 F.3d at 758. As a result, Norton's affidavit may not properly be considered in support of any claims other than those raised in the 1994 PCR petition (Claims 1, 2 and 3 of the amended petition).[FN13]

FN13. The Court did not discuss Norton's affidavit as to Claims 1-3 because it determined

that taking Petitioner's factual allegations as true he was not entitled to relief.

Clearly Established Law Regarding IAC

To prevail on a claim of IAC, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The inquiry under *Strickland* is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. To prove deficient performance, a defendant must also overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Hayes v. Woodford*, 301 F.3d 1054, 1066 (9th Cir.2002) (quoting *Strickland*, 466 U.S. at 691). To determine whether the investigation was reasonable,

the court "must conduct an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (citation and quotation marks omitted). As the Supreme Court recently reiterated, "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made and by giving a 'heavy measure of deference to counsel's judgments.' " *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (quoting *Strickland*, 466 U.S. at 689, 691).

The right to effective assistance of counsel applies not just to the guilt phase, but "with equal force at the penalty phase of a bifurcated capital trial." *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir.2002) (quoting *Clabourne v. Lewis*, 64 F.3d, 1373, 1378 (9th Cir.1995)). With respect to prejudice at sentencing, the *Strickland* Court explained that "[w]hen a defendant challenges a death sentence ... the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. In *Wiggins*, the Court further noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced in the habeas proceeding." *Id.* at 536

(quoting *Williams*, 529 U.S. at 397-98)).

A court need not address both components of the *Strickland* inquiry, or follow any particular order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, without evaluating counsel's performance, that should be done. *Strickland*, 466 U.S. at 697.

Standard of Review

Petitioner presented all of his claims of IAC-guilt phase, sentencing, and appellate-in his 1987 PCR petition. The trial court summarily rejected these and other claims, stating Petitioner "has failed to raise any colorable claim whatsoever," and "no material issue of fact or law exists which would entitle [Petitioner] to relief." (ROA-PCR, Vol. 1 of 1, ME 2/10/88 at 1.) The court also stated its belief that Petitioner "received nothing but effective assistance [of counsel]" and that "nothing [he] has raised ... would have affected the outcome of the trial or sentencing." (*Id.*) The Arizona Supreme Court denied review without comment.

Petitioner contends that because the state court gave no reasoned explanation for denial of these claims, this Court should independently review the record and assess the claims de novo. Petitioner also argues that, to the extent the PCR court explained its ruling, it applied a prejudice standard contrary to the standard outlined in *Strickland;* this argument is premised on the court's statement that "nothing [Petitioner] raised ... would have affected the outcome of the trial" (ROA-PCR, Vol. 1 of 1, ME 2/10/88 at 1), whereas *Strickland*

provides that to establish prejudice arising from IAC, a habeas applicant must show "a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different," 466 U.S. at 694.

The Court notes that Petitioner has asserted somewhat contradictory arguments, that the state PCR court adopted an improper prejudice standard and that the court provided no rationale for its determination. Regardless, as discussed at the beginning of the Merits Analysis Section, the Court agrees with Petitioner's argument that the PCR court's one-page summary dismissal of the 1987 PCR petition was not a "reasoned decision." When a state court does not provide a reasoned decision, this Court independently reviews the record and assesses whether the state court's denial of Petitioner's IAC claims was objectively unreasonable under *Strickland*. *See* *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167.

Claim 18-Guilt Phase IAC

Petitioner raises the following specific allegations of IAC during the guilt phase of his trial: (a) failure to interview witnesses; (b) failure to develop and present a defense; (c) stipulating to admitting Petitioner's prior convictions and failing to object to improper references to them; (d) failure to object to or adequately impeach Martin Norton's trial testimony; (e) failure to object to the jury questionnaire; (f) failure to object to prosecutor's closing commenting on Petitioner's silence; (g) failure to request an instruction on the voluntariness of statements to police; and (h) failure to

request an instruction on the effect of voluntary intoxication. (Dkt. 65 at 5-13.)

a. Failure to Interview Witnesses

Petitioner first contends trial counsel, George Lim, was ineffective because he failed to interview any prosecution witnesses and did "essentially no pre-trial investigation." (Dkt. 65 at 5.) Specifically, Petitioner contends that counsel:

> failed to investigate, among other things, Petitioner's state of mind at the time of the offense; his adolescent history of substance abuse; his physical, mental and emotional illnesses (even though Lim believed that investigation of Libberton's emotional state was necessary); his abused childhood and his inability to have premeditated this crime. A proper investigation would have revealed that Petitioner was under significant mental and emotional stress at the time of the crime; that Petitioner ... was under the influence of drugs and alcohol; and that he had a history of physical, mental and emotional illness.

(*Id.*)

Below, the Court reviews the evidence, to the extent properly before this Court, that Petitioner asserts establishes the prejudice prong of the *Strickland* standard.

Daniel McIntosh

Daniel McIntosh was a friend of Petitioner who

testified at trial. Petitioner contends that if counsel had conducted a pre-trial interview of McIntosh, "[counsel] could have developed evidence about [accomplice] James' greater culpability in this case and the impact of drugs and alcohol." (*Id.*)

Counsel participated in a pretrial deposition of McIntosh on December 28, 1981, at which McIntosh was examined on the issues of both James's and Petitioner's culpability and their use of alcohol and drugs. McIntosh stated, and repeated at trial, that he left James's trailer before Juan Maya arrived and had no direct knowledge of what transpired. (RT 12/28/81, McIntosh Depo. at 12, 40; RT 6/28/82 at 6-7, 35-36.) Martin Norton also testified that McIntosh was not present when the crimes were committed. (RT 6/28/82 at 68.) Thus, any information regarding culpability would not have been significantly persuasive.

On the question of Petitioner's use of drugs and alcohol, McIntosh indicated in his pretrial deposition that he was at James's trailer early on the night of the murder and that he, Petitioner, and James each drank eight or nine beers and between them smoked one marijuana cigarette. (RT 12/28/81, McIntosh Depo. at 8-9, 11.) McIntosh reiterated this during questioning by defense counsel. (*See id.* at 38-39, 40.) On cross-examination at trial, McIntosh essentially reiterated these facts. (*See* RT 6/28/82 at 26-33, 46-48.) In fact, he testified at trial that their use of marijuana may have been more than he stated in the deposition, perhaps as much as "half a bag." (*Id.* at 47.) In light of the information presented in McIntosh's pretrial deposition, defense counsel was able to elicit on cross-

examination that Petitioner was drinking throughout the day on November 16, 1981, and may have smoked as much as "half a bag" of marijuana with James and McIntosh.

Counsel could reasonably have believed an additional interview was not necessary after he questioned McIntosh during the deposition. *See Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir.1986) (counsel's failure to interview a witness is not ineffective "when the person's account is otherwise fairly known to defense counsel"). Further, Petitioner has not shown that if counsel had conducted another interview it would have provided additional persuasive evidence at trial regarding Petitioner's culpability or his use of alcohol and drugs around the time of the crime. Therefore, the Court finds there is not a reasonable probability that a pretrial interview would have changed the verdict.

Martin Norton

Petitioner also argues that if trial counsel had interviewed Martin Norton before trial, "he would have been prepared not only to impeach him, but also to make him a favorable witness about Petitioner's comparatively limited role in the alleged crimes." (Dkt. 65 at 6.) The Court disagrees and finds these assertions purely speculative.

Norton made several statements to police and prosecutors prior to trial. Although the particulars of these statements differ in many respects (primarily relating to Norton's own involvement in the crimes),

each statement implicates Petitioner as an active participant in the crimes against Maya. FN14 (*See* Dkt. 14, Exs. 13, 14; Dkt. 70, Ex. A.)

> FN14. For instance, on November 18, 1981, Norton was interviewed by authorities for the first time. At this point Maya's body had not been recovered. Detective R.E. Davis recounts in his report that Norton admitted being in contact with the victim and going with him to James's trailer. Norton told Davis he saw both James and Petitioner brutally assault Maya then take him to Maya's car and leave. Norton told Davis he did not go with them and did not know what happened to Maya. (Dkt. 14, Ex. 13 at 1-2.) Detective Davis interviewed Norton again the next day after recovering Maya's body. He recounts that Norton again admitted being with Maya on November 16, 1981, but again denied knowing what happened to him. (Dkt. 70, Ex. A at 3-4.)
>
> On November 26, 1981, Norton was interviewed by police a third time. After being advised of his *Miranda* rights, Norton told Detective Jack Hackworth that after he was picked up by Maya, they went to James's trailer. Norton told Detective Hackworth, as in his earlier statements, that Petitioner participated in beating Maya at James's trailer. Norton also recounted that he, James, and Petitioner discussed killing Maya. They planned to take him to an abandoned mine shaft on James's parents' property near

> Salome to kill him. Norton recounted that on the way up to the murder site, Petitioner held a gun on Maya. When they arrived at the site, Norton recounted that Petitioner participated in bludgeoning Maya to death with rocks and attempted to shoot him in the head, after which Petitioner and James dragged Maya's body over to the mineshaft and threw him in. (*See* Dkt. 14, Ex. 14 at 1-4.)
>
> Norton repeated these essential facts in his December 29, 1981 interview and at trial. (*See* Dkt. 14, Ex. 15 at 12, 15-18; *see also* RT 6/28/82 at 21, 26, 30-31, 38-42.)

At trial, defense counsel extensively cross-examined Norton on the inconsistencies in his several statements. (RT 6/28/82 at 55-89; RT 6/29/82 at 90-181.) Counsel crossexamined Norton on the fruits of a plea deal that would allow him to be tried as a juvenile, with a maximum sentence of three years, in return for testimony implicating Petitioner. Defense counsel also established that Norton was selling drugs for Steven James, and that he engaged in a dine and dash at a local restaurant the night of the murder. Moreover, on multiple instances defense counsel used Norton's pre-trial statements to police, in particular his December 29, 1981 statement (referenced by the "consistency clause" in his plea agreement), to highlight discrepancies in Norton's trial testimony. (*See* RT 6/28/82 at 78; RT 6/29/82 at 94-95, 97-100, 121-24, 126-27, 129-30,144-45,178-80.) At closing, defense counsel characterized Norton as a "street-wise punk," whose testimony about the murder was uncorroborated. He

emphasized that the State presented no physical evidence placing Petitioner at James's trailer that night or at the scene of the murder in Salome. (*See* RT 6/30/82 at 23-28.)

The Court has reviewed defense counsel's cross-examination of Norton and his closing arguments and believes that counsel's conduct belies any claim of ineffectiveness. Petitioner's contention that if counsel had interviewed Norton pre-trial he could have more effectively cross-examined him is vague and speculative.[FN15] He has not shown what more could have been ascertained through a pretrial interview. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir.1994) (finding insufficient conclusory allegations that did not identify what counsel would have done if performing effectively). As a result, Petitioner has not demonstrated that if counsel had interviewed Norton pretrial, there is a reasonable probability it would have changed the outcome of the trial.

> FN15. Petitioner attempts to bolster this claim with a 1991 affidavit of Norton; however, as discussed above, the Court determined that expansion of the record as to this affidavit was precluded by 28 U.S.C. § 2254(e)(2).

Diane Rhea Hodge and Daniel Severance

Petitioner contends that counsel failed to interview accomplice Steven James's girlfriend, Diane Rhea Hodge, and James's roommate, Daniel Severance. He contends that Hodge, in particular, could have testified James was a heavy substance abuser, that he was in a

"horrible state of mind" at the time of Maya's killing, and that these facts, and James's imposing physical stature, could have demonstrated that "any involvement by Petitioner in the killing was much less than that of either James or [accomplice] Norton." (Dkt. 65 at 7-8.)

In their affidavits, Hodge and Severance focus on accomplice James's state of mind at the time of Maya's killing-in particular, James's abuse of alcohol and drugs and the belligerent state of mind this produced. Neither Hodge nor Severance witnessed the crimes against Maya, but Severance speculated that James's aggressive demeanor may have "influenced" Petitioner to follow along in the crimes. (*See* Dkt. 14, Exs. 9, 10.)

On the question of Petitioner's guilt, the Hodge and Severance affidavits are of limited relevance. *See*A.R.S. § 13-412(C) (providing that duress is not a defense to homicide). Neither Hodge nor Severance were eyewitnesses to the crimes. Even if James was the prime motivator behind Maya's murder and "influenced" Petitioner's participation, such evidence is not a defense to the charges. Therefore, Petitioner cannot show that if counsel had interviewed these individuals he would have obtained any information that was reasonably probable to produce an acquittal on the first degree murder charge.

Drs. Dee and Bindelglas

Petitioner contends that counsel was ineffective for not interviewing Drs. Dee and Bindelglas prior to trial. Both doctors opined in pre-sentence reports and in

subsequent affidavits (as well as in the 1992 deposition of Dr. Dee), that Petitioner suffered from mental traits which caused him to act impulsively and without reflection and that, as a result, it is unlikely he premeditated Maya's murder. (Dkt. 65 at 8; Dkt. 70, Exs. D, E; Dkt. 14, App., Exs. 4, 5; Dkt. 26, Attach., Exs. 2, 3.)

As noted in addressing Claim 17, Arizona law allows expert testimony at trial to establish personality traits such as a tendency to act impulsively or without reflection. However, Arizona does not permit expert testimony "specifically as to whether a defendant was acting reflectively *at the time of the killing*." Rivera, 152 Ariz. at 514, 733 P.2d at 1097; *see also* Ortiz, 158 Ariz. at 533, 764 P.2d at 18; *Arnett*, 158 Ariz. at 22, 760 P .2d at 1071. Thus, even if counsel had interviewed Drs. Dee and Bindelglas prior to trial and presented them as witnesses, they could not have testified that Petitioner did not act with premeditation in the killing of Maya. If called to testify, the Court believes their opinions concerning Petitioner's general tendency to act impulsively and without reflection would have had limited impact when considered against the evidence of premeditation presented at trial, in particular Norton's eyewitness testimony of Petitioner's active participation in the assault, robbery, and murder of Maya over a period of several hours (*see* RT 6/28/82 at 25-41).

Further, Petitioner cannot establish ineffective assistance based on counsel's failure to investigate Petitioner's alleged "mental and emotional illness." (*See* Dkt. 65 at 5.) Prior to trial Petitioner was

examined by two mental health experts, Maier Tuchler, M.D., and Merton Berger, M.D. Both doctors concluded Petitioner had no major mental illness and was competent to stand trial. (*See* Dkt. 70, Exs. B, C.) Neither Dr. Dee nor Dr. Bindelglas alleged that Petitioner was insane or incompetent. Because Petitioner's sanity and competence were not challenged, and because Arizona does not allow expert testimony regarding a defendant's mental disorder short of insanity as an affirmative defense or to negate a mens rea element of the crime, such testimony could not have provided a viable defense to the charge of first degree murder. *See State v. Mott*, 187 Ariz. 536, 541, 931 P.2d 1046, 1051 (1997); *see also Clark v. Arizona*, 548 U.S. 735, 126 S.Ct. 2709 (2006) (holding that *Mott* rule does not violate due process); A.R.S. § 13-412(C) (providing that mental and emotional duress is not a defense to murder or any crime involving infliction of "serious physical injury.") For these reasons, Petitioner cannot establish a reasonable probability that if counsel had interviewed Drs. Dee and Bindelglas prior to trial and done more investigation into his general mental health history, there is a reasonable probability that he would not have been convicted.

Finally, Petitioner asserts counsel was ineffective for failing to investigate his state of mind at the time of the offense; his adolescent history of substance abuse; his physical, mental, and emotional illnesses; and his abused childhood. (Dkt. 65 at 5.) Petitioner fails to explain what evidence on these issues could have been discovered by further investigation. *See James*, 24 F.3d at 26 (finding insufficient conclusory allegations that did not identify what counsel would have done if

performing effectively). More importantly, Petitioner fails to explain how any of this information would have provided a defense to the crimes. As a result, Petitioner cannot show a reasonable probability that investigation of any of these avenues would have resulted in a different outcome at trial.

In sum, with respect to counsel's alleged failure to conduct further pretrial investigation or call additional witnesses at trial, Petitioner has not shown that the PCR court's denial of relief was objectively unreasonable under *Strickland*.

b. Failure to Develop and Present a Defense

Petitioner contends that trial counsel rendered ineffective assistance in failing to present a defense at trial. Specifically, Petitioner asserts counsel failed to give an opening statement, raised few objections, conducted ineffectual and sometimes harmful cross-examinations, and failed to cross-examine state witnesses, particularly Detective Jack Hackworth, who interviewed Martin Norton on November 26, 1981, before Petitioner gave his recorded statement on December 29. (Dkt. 65 at 9-10.)

i. Failure to Give an Opening Statement

Petitioner contends that counsel was ineffective because he gave no opening statement. He argues that due to this failure, "[t]he jury thus began to hear the evidence with only the State's version of events on their minds, suggesting from the start that Petitioner had no defense." (Dkt. 65 at 9.)

Petitioner has cited no case law to support this claim. On the contrary, "[t]he timing of an opening statement, and even the decision whether to make one at all, is ordinarily a mere matter of trial tactics and in such cases will not constitute the incompetence basis for a claim of ineffective assistance of counsel." *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir.1985). Moreover, even where counsel reserves an opening statement, then chooses not to put on witnesses, thereby losing "the opportunity to give an opening statement," the failure will not constitute ineffective assistance if counsel's action is a "reasonable strategic decision." *LaGrand v. Stewart*, 133 F.3d 1253, 1275 (9th Cir.1998).

Trial counsel presented no case-in-chief and called no witnesses. His strategy appeared to focus on attacking the credibility of the State's only eyewitness, Martin Norton. Given the centrality of Norton's testimony with respect to the first degree murder charge, this tactic was not unreasonable and counsel's failure to give an opening statement does not rise to the level of ineffective assistance of counsel.

ii. Counsel's Few Objections and Ineffectual and Harmful Cross-Examinations

Petitioner fails to elaborate on what additional objections counsel should have made or which cross-examinations of witnesses were ineffectual and harmful. Such vague, conclusory and unsupported assertions are insufficient to support a claim of IAC. *See Shah v. United States*, 878 F.2d 1156, 1161 (9th

Cir.1989) (holding that vague and conclusory allegations of ineffective assistance do not warrant habeas relief).

iii. Failure to Cross-Examine Detective Hackworth

Petitioner claims ineffective assistance based on counsel's failure to cross-examine Detective Jack Hackworth. (Dkt. 65 at 9-10.) Hackworth filed a report describing a November 26, 1981 interview he had with Martin Norton. The report recounts that Norton admitted involvement in beating, robbing, abducting, and killing Juan Maya. Norton also describes Petitioner's participation in these crimes. (Dkt. 14, App., Ex. 14 at 2-4.) Petitioner contends counsel's failure to cross-examine Hackworth "is especially significant because it was Detective Hackworth who interviewed Norton on November 26, 1981, before Norton gave his recorded statement to the State." (Dkt. 65 at 10.)

Although the State called Hackworth to testify at trial, the prosecution questioned him only about whether he had in fact interviewed Norton on November 26, 1981, whether Norton was Mirandized, whether promises or threats were made in exchange for his statement, and whether anyone else was present at the interview. (*See* RT 6/24/82 at 80-81.) The State did not question Hackworth about the substance of Norton's statements, and his report was not in evidence. Petitioner does not challenge the veracity of Hackworth's answers to any of these questions. As a result, Petitioner has failed to support his assertion that cross-examining Hackworth was crucial.

Moreover, in cross-examining Norton, defense counsel brought out discrepancies between Norton's trial testimony and his November 26, 1981 statement to police. (*See* RT 6/29/82 at 164, 174-77.) Petitioner's conclusory and unsupported assertion that Hackworth's cross-examination was crucial is not supported by the trial record; therefore, counsel's failure to conduct it did not prejudice Petitioner.

c. Failure to Oppose Admission of Petitioner's Priors and References Thereto

Petitioner contends that counsel was ineffective for stipulating to admission of Petitioner's "unrelated prior class 5 and 6 felony convictions for attempted burglary and attempted theft." (Dkt. 65 at 10.) Petitioner asserts that defense counsel should have objected pursuant to Arizona Rule of Criminal Procedure 403, on the basis that "such evidence ... would unfairly prejudice [him]." He contends counsel's failure to object "willingly exposed [Petitioner] to damaging cross examination if he decided to testify on his own behalf, which he ultimately did not do." (*Id.* at 11 .) Petitioner alleges that this affected his decision not to testify.

Petitioner fails to explain why the trial court's decision to admit these priors for purposes of impeachment was improper. Arizona allows admission of prior convictions into evidence for that purpose under certain conditions. *See*Ariz. R. Evid. 609(a). Petitioner does not explain why a Rule 403 objection would have succeeded. The mere fact that impeachment of Petitioner with his priors would have been "damaging"

is an insufficient basis for objection. Petitioner's conclusory assertion that counsel should have made a 403 objection, without more, fails to support a claim of IAC.

Petitioner also contends that counsel was ineffective for failing to object when the prosecutor "delved into [his] furlough status and convictions in its case-in-chief" and when the prosecutor stated during closing argument that Petitioner was "AWOL from the work furlough program." (Dkt. 65 at 11.) As discussed in addressing Claim 6, references to Petitioner's status as a escapee/convict were deemed admissible by the trial court to show motive. *See Libberton*, 141 Ariz. at 137-38, 685 P.2d at 1289-90. As a result, Petitioner cannot show that counsel's failure to object to prosecution references to this status during its case-in-chief and at closing amounted to deficient performance, let alone that he was prejudiced thereby. As a result, the PCR court's denial of relief was not objectively unreasonable under *Strickland*.

d. Failure to Object to or Adequately Impeach Norton's testimony

Petitioner contends that counsel rendered ineffective assistance when he "failed to object or impeach adequately" Norton's trial testimony. (Dkt. 65 at 12.) He also asserts that counsel was ineffective for failing to seek a cautionary instruction about Norton's testimony or his plea agreement. (*Id.*)

Petitioner provides no specific examples of the alleged inadequacies of counsel's impeachment of Norton. As

previously noted, counsel cross-examined Norton extensively. Counsel attacked Norton's credibility by noting inconsistencies between his various statements to police and his trial testimony; he cross-examined Norton on any benefits he received in return for his testimony against Petitioner; and the plea agreement was admitted in evidence. (*See* RT 6/28/82 at 54, 55-89; RT 6/29/82 at 90-180.) As a result, counsel was able to inform the jury that Petitioner would be tried as a juvenile and given a correspondingly light sentence if he testified consistent with his December 29, 1981 statement. For these reasons, Petitioner's conclusory allegation of a failure by counsel to "adequately" impeach Norton is insufficient to support a claim of deficient performance, let alone establish prejudice.

Petitioner's contention that counsel was ineffective for failing to object to the admission of Norton's plea agreement into evidence during his direct examination is also without merit. In addressing Claims 9 and 41, the Court concluded that admission of the plea agreement, and references to its contents on direct examination, did not rise to the level of a due process violation. As a result, counsel's failure to object to its admission was not deficient. Moreover, in light of the fact that a key tactic of the defense was to attack Norton's testimony, counsel could reasonably have concluded that admitting the plea into evidence would aid in challenging Norton's credibility because it was evidence that Norton had an ulterior motive to implicate Petitioner in Maya's murder.

Regarding the claim that counsel was ineffective in failing to seek a cautionary instruction about Norton's

testimony, the Court addressed this issue in Claim 10 and found such an instruction unwarranted under Arizona law. Thus, any claim of deficiency based on counsel's failure to seek such an instruction is without merit. In sum, the PCR court's denial of relief on these claims was not objectively unreasonable in light of the principles outlined in *Strickland*.

e. Jury Questionnaire

Petitioner next contends that trial counsel was ineffective for failing to object to the jury questionnaire. (Dkt. 65 at 12.) He argues that the questionnaire prejudiced the jury by vouching for the credibility of a prosecution witness and amounted to a comment on the evidence. In denying Claims 9 and 41, the Court rejected Petitioner's substantive challenges to the use of the questionnaire. As a result, Petitioner cannot show that counsel's failure to object to the questionnaire constituted deficient performance or was prejudicial. Therefore, the PCR court's denial of relief was not objectively unreasonable.

f. Failure to Object to Prosecutor's Closing Comment on Petitioner's Silence

Petitioner asserts that counsel was ineffective for failing to object to the prosecutor's alleged comment on Petitioner's silence. (Dkt. 65 at 12.) The Court discussed this issue in addressing Claims 4 and 16. For the reasons discussed therein, the Court believes the comments challenged by Petitioner did not violate his rights. As a result, the claim that counsel rendered deficient performance for failing to object is without

merit. *See Beardsley v. Woodford*, 358 F.3d 560, 586 (9th Cir.2004) ("because the prosecutor's comments were not outside the bounds of permissible argument, competent counsel might have decided not to object").

g. Failure to Request Instruction on Voluntariness of Statements to Police

Petitioner acknowledges that the trial court denied his motion to suppress his pre-trial statements to police. (Dkt. 65 at 12.) However, he alleges that counsel rendered ineffective assistance when counsel "failed to request that the judge instruct the jury that the State still had the burden to prove beyond a reasonable doubt the voluntariness of Petitioner's statement when those statements were offered at trial." (*Id.*)

Petitioner cites no case law to support his assertion that he was entitled to an instruction that the State prove the voluntariness of Petitioner's statements to police beyond a reasonable doubt if those statements are offered at trial. In fact, the Arizona Supreme Court has held that, although confessions in Arizona are presumed to be involuntary, the State has the burden of proving voluntariness only by a preponderance of the evidence. *State v. Trostle*, 191 Ariz. 4, 14, 951 P.2d 869, 879 (1997). This standard was in place at the time of Petitioner's trial in 1982. *See State v. Arnett*, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978). Because the State did not have to establish the voluntariness of Petitioner's statements beyond a reasonable doubt, the trial court would not have given such an instruction and counsel may not be deemed ineffective for not requesting it. The PCR court's denial of relief on this

claim was not objectively unreasonable.

h. Failure to Request Instruction on Effect of Voluntary Intoxication

Finally, Petitioner contends that trial counsel rendered ineffective assistance because he "failed to request an instruction on the effect of voluntary intoxication on the required culpable mental state for first degree murder despite evidence in the record that Petitioner was under the influence of alcohol and drugs at the time of the crime." (Dkt. 65 at 12.) Petitioner contends evidence of his voluntary intoxication supported a defense that he could not premeditate or intentionally commit first degree murder. (*Id.*)

The trial court instructed the jury that the requisite culpable mental state for first degree premeditated murder was that "[t]he defendant *intended or knew* that he would cause the death of another person." (RT 6/30/82 at 41 (emphasis added)); *see also* A.R.S. § 13-1105(A)(1). As discussed in Claim 11, at the time of Maya's murder, based on A.R.S. § 13-503, "the jury [could] consider voluntary intoxication in determining culpable mental state only when the culpable mental state of " 'intentionally or with the intent to' is a necessary element of the offense." *Schurz*, 176 Ariz. at 54-55, 859 P.2d at 164-65; *see also Ramos*, 133 Ariz. at 5, 648 P.2d at 120. Thus, the Arizona Supreme Court concluded that "the giving of a voluntary intoxication instruction in a murder case in which both intent and knowing are alleged would be improper." *Id.* at 55, 859 P.2d at 165; *see also Ramos*, 133 Ariz. at 6, 648 P.2d at 121 (upholding federal due process challenge to A.R.S.

§ 13-503).

In light of this precedent, and the fact that the trial court instructed the jury that the proper mental state for premeditated first degree murder is that the defendant "intended or knew" his conduct would cause the death of another, Petitioner was not entitled to a voluntary intoxication instruction. Because the trial court would not have given such an instruction, counsel's failure to request a voluntary intoxication instruction was not deficient performance nor was Petitioner prejudiced thereby.

Cumulative Error

None of Petitioner's claims of ineffective assistance of counsel at the guilt stage warrant habeas relief. In each instance, Petitioner has failed to demonstrate that counsel's performance was deficient and that he was prejudiced by counsel's alleged shortcomings. Therefore, Petitioner's allegations, considered cumulatively, cannot amount to deficient performance or establish prejudice. *See Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir.2004).

Evidentiary Hearing

Even if Petitioner diligently sought to develop these claims in state court, to warrant an evidentiary hearing he must demonstrate that there are material facts in dispute and that the facts he alleges would, if proved, entitle him to relief. *Townsend*, 372 U.S. at 312-13. In addition, a hearing is not warranted if Petitioner's claims can "be resolved by reference to the

state court record and the documentary evidence." *Griffey v. Lindsey*, 345 F.3d 1058, 1067 (9th Cir.2003); *see also Cardwell*, 152 F.3d at 338-39 (denying an evidentiary hearing on IAC claims where the petitioner "failed to forecast any evidence beyond that already contained in the record, or otherwise explain how his claim would be advanced by an evidentiary hearing.").

The Court finds that the allegations in Claim 18a (failure to interview witnesses and conduct pretrial investigation) may be disposed of based on the record. That record, including the 1981 deposition of Daniel McIntosh, the pre-trial statements and trial testimony of Martin Norton, the affidavits of Diane Rhea Hodge and Daniel Severance, the presentence reports and 1987 affidavits of Drs. Dee and Bindelglas, and the 1992 deposition of Dr. Dee, is sufficient to dispose of the claim that counsel failed to interview witnesses and investigate the case pre-trial. *See Bashor*, 730 F.2d at 1233 (upholding the denial of an evidentiary hearing where "[t]he state court records for this case are adequate to review these allegations of ineffectiveness.") Given the information already in the record, Petitioner has not explained how this claim would be advanced by an evidentiary hearing.[FN16] *See Cardwell*, 152 F.3d at 338. In addition, as noted in addressing the substance of these claims, nothing in the documentary evidence supports the conclusion that if counsel had interviewed these individuals, there is a reasonable probability Petitioner would not have been convicted of first degree murder. Thus, Petitioner has not alleged facts with respect to Claim 18a which, if proved, would entitle him to relief. *See Townsend*, 372 U.S. at 312-13. Therefore, an evidentiary hearing on

this claim will be denied.

> FN16. As already discussed, to the extent Petitioner relies on Martin Norton's 1991 affidavit, Petitioner was not diligent in presenting this affidavit in state court with respect to his IAC claims and, as a result, he is not entitled to expansion of the record to include this affidavit. Because Petitioner failed to develop this aspect of his IAC claim concerning the failure to interview Norton pre-trial he is not entitled to an evidentiary hearing based on the 1991 affidavit.

Similarly, regarding Claim 18b (counsel developed no defense), Petitioner does not delineate what facts need further development. The Court finds the current record is sufficient to resolve these issues. Moreover, as noted in addressing the merits of this claim, Petitioner can not demonstrate prejudice from counsel's alleged shortcomings and, thus, he has not alleged facts, which if proved, would entitle him to relief. *See Townsend*, 372 U.S. at 312-13.

With respect to the remaining IAC guilt-phase claims, 18c-18h, the Court finds that an evidentiary hearing is not warranted. Petitioner has not demonstrated that any additional material facts need to be developed with respect to these claims. For the reasons discussed in addressing the substance of these claims, they fail as a matter of law. Even if the facts as alleged by Petitioner are true, he has not established that he would be entitled to relief. *See Townsend*, 372 U.S. at 312-13. Therefore, Petitioner is not entitled to an evidentiary

hearing on these claims.

Claim 19-IAC at Sentencing

Petitioner presents several specific allegations of IAC at sentencing. He alleges that counsel failed (a) to investigate and present mitigation evidence from Petitioner's close relatives and a childhood friend; (b) to interview the author of the presentence report and investigate its contents; (c) to present experts and mitigating psychiatric evidence; (d) to present evidence of substance abuse and chemical dependency; (e) to offer evidence that the death sentence was excessive; (f) to develop evidence that accomplices were more culpable; (g) to present evidence from Henry Dean; and (h) to present evidence of the stable environment provided by prison. (Dkt. 65 at 14-17.)

Background

Prior to the mitigation hearing, the trial court permitted two mental health experts, Drs. Bindelglas and Dee, to examine Petitioner. (*See* ROA-PCR, Vol. 1 of 1, ME 7/16/82, ME 9/15/82.) Both filed reports on October 18, 1982. (*See* Dkt. 70, Exs. D, E.) The Court has recounted their findings in addressing the issues raised in Claims 17 and 18a.

In addition, a Presentence Report was filed prior to the mitigation hearing. (ROA, Vol. 2 of 2.) The author of the PSR recounted statements from several interested parties. Juan Maya's two sisters and brother, as well as a sister-in-law, recounted that Maya's death had been extremely difficult for his family. One sister, Rosa

Martinez, noted that Maya was the youngest of nine siblings, that he resided with their parents, and that he was "primarily" responsible for looking after them. (*Id.* at 2.) Each relative recommended that Petitioner be sentenced to death. (*Id.* at 2-3.) Detective Thomas Neus characterized Petitioner as "cocky and arrogant" at times during interviews and stated his belief that "he seemed to be playing games." (*Id.* at 3.) Detective Russ Davis noted the heinous nature of the murder, including the fact that Maya was tortured over a period of hours, and his belief the murder was cold blooded and senseless. (*Id.*)

Petitioner's father, David, recounted his belief that Petitioner did not deserve death and stated that Petitioner could thrive in prison and rehabilitate himself. He also stated that although he believed the killing of Maya was out of character, he also had no doubt Petitioner was involved and "may have been the leader in planning the crime." (ROA, Vol. 2 of 2, PSR at 3.) The State asserted three "aggravating factors," including the fact that the crime was committed for pecuniary gain, that it was committed in an especially cruel and heinous manner, and that Petitioner was an escapee from the prison work furlough program. (*Id.* at 4.) Finally, Petitioner's trial counsel recounted to the PSR author that he did not believe the death penalty was warranted because Petitioner was not a "hardened" criminal. Counsel also cited Petitioner's relative youth as a factor weighing against imposition of the death penalty. (*Id.*)

The PSR author noted that Petitioner was treated for psychological problems as an adolescent, which

Petitioner described as mostly due to his "ambivalent" relationship with his father. (ROA, Vol. 2 of 2, PSR at 6.) Petitioner told the author that he drank alcohol but denied he was an abuser. He also said he had "experimented" with a variety of drugs in the past but used no drugs except marijuana at the time of his arrest. (*Id.*) The author concluded by stating his belief that the crimes against Maya were motivated by the prospect of financial gain and that the pecuniary basis for the murder, as well as the "senseless, unnecessary and ... particularly cruel and depraved manner" in which it was committed, warranted the maximum penalty prescribed by law. The PSR recommended that the mental and physical suffering experienced by Maya should be considered in determining the appropriate sentence. (*Id.* at 7.) The record is devoid of any indication that the parties filed presentence memoranda.

At the mitigation hearing, the State called two witnesses, Carl Edward Haas and Bill Fitzgerald. Haas was a detention officer with the Maricopa County Sheriff's Office who worked at the Durango Jail. (RT 10/20/82 at 5.) His duties included accounting for inmates on work furlough. He stated that Petitioner was scheduled for work furlough from 6:00 a.m. to 6:00 p.m. He testified he was on duty on November 12, 1981, at approximately 4:00 a.m, and he determined Petitioner was not present. (*See id.* at 6.)

Fitzgerald was the work furlough coordinator with the Maricopa County Adult Probation Department. He testified that Petitioner was in the work furlough program based on charges of burglary and attempted

theft. (RT 10/20/82 at 8.) Fitzgerald stated that Petitioner was reported escaped on November 12, 1981. (*Id.* at 9 .) On cross-examination, Petitioner's counsel elicited that a prisoner was considered escaped if he did not report back from work release. (*Id.*)

Petitioner's counsel called two witnesses, Nancy Henry and Geraldine Smith. Henry testified she had known Petitioner since he was born, as a friend and a friend of his mother. (RT 10/20/82 at 13.) She stated she never knew Petitioner to be violent when he was younger, just that his mother indicated he had troubles with grades and school work. She described Petitioner as having a "love-hate relationship" with his father and stated he couldn't get along with him. She testified that Petitioner's father was "difficult to understand" and had disappointed Petitioner a lot. (*Id.* at 14-15.)

Henry indicated that Petitioner used drugs. She further stated that she did not believe Petitioner to be a violent person and that if he was involved in the murder of Maya, he could not have acted on his own. She described Petitioner as a "follower [who] would get into something and then he would just follow it through, go along with the crowd." (RT 10/20/82 at 16.)

Geraldine Smith testified that she knew Petitioner because he dated her daughter for about six months approximately a year prior to the crimes and lived in her home for approximately a month. (RT 10/20/82 at 19-20.) Smith also testified that Petitioner had great difficulties with his father. She testified that Petitioner told her that every time he tried to go forward his father would knock him down. She also stated that his

prior convictions, for which he was in custody at the time of Maya's murder, were based on his breaking into his father's business and taking money he believed his father owed him but refused to pay. (*Id.* at 21.) Smith recounted Petitioner describing his stormy relationship with his father:

> His father was always telling him to do right, do things right, but his father wasn't actually doing things right in a lot of different directions. [Petitioner] tried very hard to follow in his footsteps. He would liked to have gone places with his father, but was never allowed to. And other times he would have a brainstorm about how to make something go at [his father's business] West World, his father wouldn't go along with it and it was just, no matter what Larry did, his dad would knock the pins out from under him.

(*Id.* at 22.)

Smith further testified that she knew Petitioner used drugs, which made her unhappy because he was dating her daughter, but noted that he "was desperately trying to quit." Smith stated Petitioner was never violent toward her daughter. She stated that she did not believe Petitioner could have murdered Maya because he is "very tender hearted." She described Petitioner as a follower who wanted to belong. (RT 10/20/82 at 22-23.)

At the end of this testimony, Petitioner's counsel asked the court to note that Petitioner's only priors were based on his breaking into his father's place of

business and were predicated on his difficult relationship with his father. (RT 10/20/82 at 27.) Counsel also asked the court to consider that Petitioner had no previous record of violence and was only twenty years old at the time of the crimes. Counsel further argued that Petitioner sought psychological care while on the jail furlough program but, in spite of promises, he did not receive any treatment. (*Id.*) Counsel emphasized that Petitioner "appeared to be a follower rather than the instigator and that Mr. James apparently wanted [Maya] killed." (*Id.* at 28.) Counsel argued Petitioner "went along with Mr. James ... he was a follower at all times involved in the killing. The initial steps were taken by James and the only thing [Petitioner] did was just follow along like a blind sheep that he is ..." (*Id.*)

Counsel for the State emphasized that Petitioner "is the one who held the gun on Mr. Maya in the back seat of the car the entire time Mr. Maya was held hostage while being transported out to the [murder] scene." She noted that although Petitioner was only twenty, "he has had numerous other contacts with the law" and whether or not his father caused some of his actions, "he took no course of action that would have kept him out of those problems." (RT 10/20/82 at 28-29.) Counsel noted that Petitioner blamed others, including the State, his father, and accomplices James and Norton for his problems and showed no remorse or compassion for the victim. (*Id.* at 29.) She also noted that Dr. Dee concluded in his report that Petitioner was "a time bomb waiting to go off .... he places distance between himself and his troubles. He doesn't relate to the trouble he is in and he doesn't learn from experience."

(*Id.*)

Finally, the prosecutor discounted Dr. Bindelglas's opinion that he didn't think Petitioner could have premeditated the murder because of his tendency to act impulsively and without reflection. She noted that Dr. Bindelglas's conclusions must be weighed against the undisputed evidence that the length of time between Maya's arrival at James's mobile home and his murder in Salome was "in the vicinity of five to six to seven hours or plenty of time for premeditation." (RT 10/20/82 at 29-30.)

In its Special Verdict, the sentencing court found two aggravating factors:

> 5. The defendant did commit the offense as consideration for the receipt or in expectation of the receipt of pecuniary value in that "the hope of financial gain was a cause of the murder." [Citation omitted.]
>
> 6. The Court finds that the defendant committed the offense in an especially heinous, cruel and depraved manner.

(ROA, ME 10/25/82 at 1-2.) Concerning mitigating factors, the court found as follows:

> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired and certainly not so impaired as to constitute a defense to the prosecution.

2. The defendant was not under unusual or substantial duress.

3. The defendant was one of the individuals who actually committed the offense and was not found guilty by reason of being legally accountable for the conduct of another under the provisions of A.R.S. 13-303. Therefore, this mitigating circumstance does not exist.

4. The defendant could have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause or would create a grave risk of causing, death to another person. Therefore, this mitigating circumstance does not exist.

5. The Court does not find the defendant's age, to-wit: 20 years of age at the time of the offense and 21 years of age at the time of sentencing to be a mitigating factor circumstance.

6. The Court does not find any other mitigating circumstances.

The Court having taken into account the aggravating and mitigating circumstances, the Court finds that two aggravating circumstances exist, to-wit: the offense was committed in expectation of the receipt of something of pecuniary value and defendant did commit the offense in an especially heinous, cruel and depraved manner; and the Court further finds that there are no mitigating circumstances significantly substantial to call for

leniency.

(*Id.* at 2-3.)

a. Lack of Mitigation Investigation

Petitioner contends that counsel rendered ineffective assistance because he "failed to investigate and prepare adequately for the capital sentencing proceeding following the trial." (Dkt. 65 at 14 .) He asserts that counsel presented only two mitigation witnesses, a neighbor and .the mother of an ex-girlfriend. (*Id.*) Conversely, counsel failed to call close relatives, including Petitioner's mother, Jo Ann Donaldson; his sister, Susan Farias; and a childhood friend, Helen Robichaux. Petitioner contends that these persons were more familiar with his personality and background and "would have testified about [his] physically and emotionally abusive father, [his] unstable childhood, his history of substance abuse and chemical dependency, his inability to commit such a crime on his own, and his literary talent." (*Id.*) Petitioner presented affidavits from these individuals in support of his 1987 PCR petition. (*See* Dkt. 26, Attach., Exs. 8, 9, 10; Dkt. 14, App., Exs. 18, 19, 20.)

A habeas petitioner facing a death sentence for capital murder has a "right-indeed, a constitutionally protected right-to provide the jury with ... mitigating evidence." *Williams*, 529 U.S. at 393. "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present [ ] and explain[ ] the significance of all the available

[mitigating] evidence.' " *Id.* at 399. Part of this duty is an "obligation to conduct a thorough investigation of [the defendant's] background." *Id.* at 396. "Judicial deference to counsel is predicated on counsel's performance of sufficient investigation and preparation to make reasonably informed, reasonably sound judgments." *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir.2001). "Defense counsel's use of mitigation evidence to complete, deepen, or contextualize the picture of the defendant presented by the prosecution can be crucial to persuading [the sentencing court] that the life of the capital defendant is worth saving." *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir.2005). Thus, "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' " *Id.* at 1001 (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

In her affidavit, Jo Ann Donaldson described Petitioner's father, David, as being "very difficult ... not an easy person to live with." (Dkt. 26, Attach., Ex. 8 at 1.) In particular, she pointed to Petitioner's love-hate relationship with his father, which was compounded by David's hostile attitude toward Petitioner; according to Donaldson, Petitioner's father often criticized Petitioner but never praised him. She stated that David's uncaring attitude toward Petitioner had a bad effect on him emotionally. (*See id.* at 2-3 .)

Donaldson indicated that Petitioner suffered headaches in 1979 and, although she wanted to have him checked medically, "money was very tight." (Dkt.

26, Attach., Ex. 8 at 3.) She stated that after that Petitioner seemed "different" and was "unable to control his temper." (*Id.*) Donaldson also described Petitioner as a "follower" who wanted to be "accepted" and would go along with what anyone else wanted him to do. (*Id.* at 4.) For this reason, she did not believe Petitioner would have committed the crimes at issue if he had been alone. (*Id.*) She described Petitioner as a "loving, sensitive, intelligent person." (*Id.* at 5.)

Petitioner's sister, Susan Farias, reiterated how difficult Petitioner's father was and that his "rejection" affected all of his children profoundly. (Dkt. 26, Attach., Ex. 9 at 2-3.) She described their childhood as unstable due to their parents' divorce and the fact that their mother moved to the Pacific Northwest. She recounted one particular incident in 1972, when Petitioner's father discovered that Petitioner and his brother had taken go-cart parts from his business. She stated that her father beat them "very badly" and dropped them off at the juvenile center. (*Id.* at 4.) This story was confirmed by Petitioner's mother. (Dkt. 26, Attach., Ex. 8 at 2-3.)

Farias stated that Petitioner "was easily influenced by others" and "would do anything to [be] accepted by others." (Dkt. 26, Attach., Ex. 9 at 6.) Farias recounted that she noticed a change in Petitioner in the summer of 1980; he was unable to control his emotions and was often "explosive." (*Id.* at 7.) She stated he was using drugs "as often as he could" and "was more seriously dependent on drugs than I had known." (*Id.*) She stated that her mother wanted Petitioner to see a neurologist due to his headaches but "money was very

scarce." (*Id.*) Farias stated that she was shocked when she learned Petitioner was charged with first degree murder. She did not believe he was capable of it because he was not "cold or calculating" but "act[ed] without thinking" and "follow[ed] others." (*Id.* at 8.)

Childhood friend Helen Robichaux stated that she had known Petitioner since she was about eight or nine years old. She stated that Petitioner's father "had a violent temper ... was extremely impatient and impossible to believe. He was very critical of everyone around him." (Dkt. 26, Attach., Ex. 10 at 1.) She stated that Petitioner had an unstable home life while growing up because his parents divorced. She didn't believe Petitioner's father "ever loved [him]. He never showed him any affection" and thought Petitioner was "worthless." (*Id.* at 2.)

Robichaux further stated Petitioner was always seeking the approval of others and wanted to be liked. (Dkt. 26, Attach., Ex. 10 at 2.) She recounted that Petitioner was a drug user from an early age. When she learned he was charged with first degree murder she could not believe it. She believed his mind "must have snapped" because he was a "follower" who would not have done such a thing on his own. (*Id.* at 3-4.) She believed if he was free from the influence of drugs and was alone he would not have committed such a crime. (*Id.* at 4.)

The Court finds that even if counsel was deficient in not presenting testimony from these individuals at the mitigation hearing, Petitioner cannot establish prejudice. Much of the information offered in the

affidavits of Petitioner's mother, sister, and childhood friend in particular, their characterization of his stormy relationship with his father, his substance abuse, and his tendency to be follower was similar to testimony presented at the mitigation hearing by defense witnesses Henry and Smith. The only "new" information is a statement that Petitioner's father had been physically violent with him and the fact that in the year before the crimes Petitioner was experiencing headaches and his sister and mother noticed a change in his behavior. The allegation of physical violence does not add substantively to the information before the trial court concerning Petitioner's troubled relationship with his father. Regarding Petitioner's headaches, he was examined by two medical doctors prior to trial and found to have no major mental illnesses; moreover, evidence of his impulsive behavior traits was already before the court by way of the affidavits of Drs. Dee and Bindelglas. The Court acknowledges that Petitioner's mother, sister, and childhood friend were closer to Petitioner and knew him better than Henry or Smith, and that additional testimony from these individuals would not have harmed his case.[FN17] However, when weighed against the evidence presented at trial and the facts as recounted in the PSR, the Court believes that the cumulative nature of their testimony would have had limited impact.

> FN17. Dr. Bindelglas interviewed Petitioner's mother and noted in his pre-sentence report that she had not seen him in a year and a half. (Dkt. 70, Ex. D at 2.)

The evidence presented at trial showed Petitioner

planned this crime with James over a period of several hours, then executed the plan in a particularly cruel and cold-blooded manner. Evidence further shows the murder was motivated by pecuniary gain as well as a desire to obtain transportation so Petitioner could escape from serving a jail sentence. There is not a reasonable probability that testimony from Petitioner's mother, sister, and friend-essentially character evidence similar to testimony presented at the mitigation hearing-would have resulted in a different sentence. For the above reasons, the PCR court's denial of relief was not objectively unreasonable in light of the principles outlined in *Strickland*.

b. Failure to Interview Author of PSR or Investigate its Contents

Petitioner contends that counsel was ineffective for failing to interview the PSR author and failing to investigate the report's contents. Petitioner fails to explain why counsel should have conducted such an interview and what counsel should have investigated. Without more, this conclusory assertion is insufficient to support a claim of IAC.

c. Failure to Present Experts and Mitigating Psychiatric Evidence

Petitioner contends that counsel was ineffective for failing to present available mitigating psychological evidence. Specifically, Petitioner cites counsel's failure to call Drs. Bindelglas and Dee to testify at the mitigation hearing. (Dkt. 65 at 15.)

As the Court noted in addressing Claim 17, both doctors opined in their pre-sentence reports that Petitioner's mental makeup made him prone to act impulsively and reflexively and concluded that he likely could not have premeditated Maya's murder. (*See* Dkt. 70, Ex. D at 3, Ex. E at 3.) Both doctors also filed affidavits in support of Petitioner's 1987 PCR petition.

In addition to reiterating and emphasizing the conclusions in his 1982 report, Dr. Dee stated in his affidavit that if he'd been called to testify at the mitigation hearing he "could also have explained that my finding was not inconsistent with the lapse of time between the time that Mr. Maya first appeared at James' trailer and the time of Mr. Maya's killing at the mine." (Dkt. 26, Attach., Ex. 2 (Dee Aff.) at 1, 2.) Similarly, in his affidavit Dr. Bindelglas reiterated his findings that Petitioner had defective judgment, was prone to act impulsively, and was unlikely to have premeditated Maya's killing. Like Dr. Dee, he stated that if called to testify at the mitigation hearing, he could have explained that the "lapse of time" between Maya's arrival at James' trailer and his murder in Salome "does not necessarily mean that Mr. Libberton acted with premeditation." (*Id.*, Ex. 3 (Bindelglas Aff.) at 4.)

A state court has broad discretion in determining the credibility of mitigation evidence offered by mental heath experts. *See* *State v. Kayer*, 194 Ariz. 423, 437, 984 P.2d 31, 45 (1999); *State v. Doerr*, 193 Ariz. 56, 69, 969 P.2d 1168, 1181 (1998). The court is not compelled to find expert testimony credible if it believes the

experts' opinions are refuted by the facts and common sense. *See State v. Martinez*, 196 Ariz. 451, 463-64, 999 P.2d 795, 807-08 (2000); *see also Ceja*, 97 F.3d at 1251 (citing *Eddings*, 455 U.S. at 114-15, for the proposition that "[i]t was for the Arizona courts to 'determine the weight to be given [mitigating] evidence.' ")

In light of the evidence presented at trial of the planning and execution of the crime, its cruel and cold-blooded nature, Petitioner's active participation at all stages, the fact that he was motivated by pecuniary gain and a desire to obtain transportation so he could escape from serving a jail sentence, and the fact that the written reports of Dee and Bindelglas were submitted to the sentencing court, the Court does not believe there is a reasonable probability that if Dee and Bindelglas had testified, the court would not have sentenced Petitioner to death. As a result, Petitioner cannot establish prejudice from counsel's failure to call Drs. Dee and Bindelglas to testify at the mitigation hearing and the PCR court's denial of relief was not objectively unreasonable under *Strickland*.

d. Failure to Present Evidence of Substance Abuse or Chemical Dependency

Petitioner next contends that counsel was ineffective at sentencing because he "failed to develop or present any evidence, expert or otherwise on the effect of substance abuse or chemical dependency ... despite evidence of a history of substance abuse and Petitioner's ingestion of alcohol and drugs before the crime." (Dkt. 65 at 15.)

Voluntary intoxication may be considered a mitigating

factor "if the defendant proves by a preponderance of the evidence that his 'capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution.' " *State v. Stokley*, 182 Ariz. 505, 520, 898 P.2d 454, 469 (1995) (citing A.R.S. § 13-703(G)(1)). Voluntary intoxication may also be considered as a non-statutory mitigating factor. *See State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097, 1117 (1994). It is for the state court to weigh any mitigating evidence and determine its significance. *See Ceja*, 97 F.3d at 1251; *see also Eddings*, 455 U.S. at 114-15.

Counsel did not specifically argue at the mitigation hearing that Petitioner's history of alcohol and drug use, as well as his use of alcohol and marijuana the day of the crime, should be considered mitigating factors in sentencing. However, irrespective of the quality of counsel's performance, Petitioner cannot establish prejudice. Evidence on this point was presented at trial and at the mitigation hearing. At trial, Daniel McIntosh testified that he was with Petitioner most of the day prior to the murder until early evening. He recounted that he, Petitioner, and James drank as much as two twelve packs of beer between them and smoked as much as "half a bag" of marijuana. (*See* RT 6/28/82 at 6-7, 26-27, 28, 30-33, 46-48.) Martin Norton also testified that James, McIntosh, and Petitioner drank beer that evening (though he describe a smaller amount). At the mitigation hearing, the witnesses called by Petitioner, Nancy Henry and Geraldine Smith, testified that he had a history of drug abuse.

Conversely, other evidence supported the court's determination that Petitioner was not so impaired that he was unable to appreciate his actions on the night of the murder. Norton testified that neither Petitioner nor James drank alcohol or took drugs from the time of his arrival at James's trailer with Maya until the time they murdered Maya in Salome, a period of several hours. (RT 6/28/82 at 31.) Following a pre-trial mental examination, Dr. Merton Berger recounted that although Petitioner told him he had a history of drug use, Petitioner insisted he was not under the influence of drugs or alcohol during the time in question. (Dkt. 70, Ex. C at 2.) Dr. Berger specifically opined, "it is doubtful that this man was out-of-touch with reality" at the time of the murder. (*Id.*) Dr. Maier Tuchler also found no mental impairment. (*Id.* at Ex. B.)

The sentencing court heard, both at trial and during the mitigation hearing, that Petitioner had a history of substance abuse and that he had been drinking alcohol and smoking some marijuana the day of the murder. Nevertheless, the court did not find this evidence sufficient to establish the (G)(1) statutory mitigator nor substantial enough to warrant leniency. As noted, it is for the state court to weigh any mitigating evidence and determine if it warrants leniency. *See* *Ceja*, 97 F.3d at 1251; *see also* *Eddings*, 455 U.S. at 114-15. To the extent Petitioner contends there should have been expert evidence regarding the effects of substance abuse, he does not point to any specific evidence that should have been presented. For these reasons, this Court concludes that Petitioner cannot establish a reasonable probability that the trial court would not have sentenced him to death if counsel had offered

further evidence at the mitigation hearing of Petitioner's history of substance abuse and his use of alcohol and marijuana the day of the crime. Thus, the PCR court's denial of relief on this claim was not objectively unreasonable under *Strickland*.

e. Failure to Offer Evidence Death Sentence was Excessive

Petitioner contends that counsel was ineffective for failing "to present any evidence or legal argument at sentencing as to whether a death sentence ... would be excessive when compared to sentences imposed for similar crimes and for similar offenders." (Dkt. 65 at 15.) At that time, it was the Arizona Supreme Court and not the trial court that performed "proportionality review ... considering similarly situated defendants." *State v. Greenway*, 170 Ariz. 155, 171, 823 P.2d 22, 38 (1991). Therefore, failure to make a proportionality argument to the trial court did not constitute ineffective assistance.

Moreover, the Arizona Supreme Court conducted a proportionality review of Petitioner's sentence on direct appeal. *See Libberton*, 141 Ariz. at 140-41, 685 P.2d at 1292-93. Citing several examples of "analogous" cases where death was imposed, the court held that "the imposition of the death penalty in this case is not disproportionate to the penalty imposed in similar cases." *Id.* Because the Arizona Supreme Court found Petitioner's death sentence justified following a proportionality review, Petitioner cannot show prejudice from counsel's failure to request such review by the trial court. The state PCR court's denial of relief

was not objectively unreasonable.

f. Failure to Develop Evidence Accomplices were More Culpable

Petitioner argues that counsel was ineffective for failing "to develop the evidence ... that James and Norton were far more culpable than Petitioner." (Dkt. 65 at 15.) Petitioner fails to explain what additional evidence was available but not discovered. In fact, counsel did argue that Petitioner was not as culpable: "the Court has heard all the evidence, I think the Court will recall that during that time the crime was being committed that at all times Mr. Libberton appeared to be a follower rather than the instigator and that Mr. James apparently wanted the person killed...." (RT 10/20/82 at 28.)

Both mitigation witnesses presented by counsel supported Petitioner's claim that he was a "follower" and emphasized that Petitioner would not have committed the crime by himself. This view was also echoed in the reports of Drs. Dee and Bindelglas. Petitioner's conclusory assertion is factually erroneous and without merit.

g. Failure to Present Testimony from Henry Dean

Petitioner alleges that counsel was ineffective at sentencing for failing to present the testimony of Henry Dean. Dean was a detention officer at the Durango Jail "who guarded the work furlough prisoners" like Petitioner at the time of Maya's murder. Petitioner contends that Dean could have testified at

the mitigation hearing "that Petitioner did not give him any trouble but was subject to personality changes that Petitioner's fellow inmates attributed to Petitioner's drug use." (Dkt. 65 at 16-17; *see* Dkt. 14, App., Ex. 23 at 4-12.)

Even assuming that counsel should have called Dean as a witness at the mitigation hearing, Petitioner cannot establish prejudice. Dean rested his belief that Petitioner was under the influence of drugs at the time of the murder on hearsay from unnamed inmates at the jail. He specifically stated that he had no personal knowledge that this was true and could not recall noting any personality changes in Petitioner during the time they were in contact. (*See* Dkt. 14, App., Ex. 23 at 14, 16.) Conversely, in his pre-trial examination of Petitioner, Dr. Berger recounted Petitioner telling him that he was not under the influence of alcohol or drugs at the time of Maya's murder. (*See* Dkt. 70, Ex. C at 2.) For these reasons, the Court does not believe there is a reasonable probability that if the state court had heard Dean's testimony it would not have sentenced Petitioner to death. The PCR court's denial of relief was not objectively unreasonable under *Strickland*.

h. Failure to Present Evidence of Stable Environment Provided by Prison

Petitioner contends that counsel was ineffective for not raising as a mitigating circumstance Petitioner's "need for psychological counseling, the state's recognition of that need, and the state's failure to meet it." (Dkt. 65 at 16.) Petitioner also argues that counsel should have provided evidence that there was a "high" probability

that a stable environment in prison and the "therapeutic effect of the passage of time and [his] resultant maturation ... would resolve his significant psychological and emotional problems." (*Id.* at 17.)

In fact, counsel made the first argument at the mitigation hearing:

> I would also like the Court to take notice that in previous hearings the defendant had attempted to have psychological care while he was on the work furlough program, while he was in custody, and in fact had been promised at least in his estimate by the state that he would get this particular treatment. And one of the reasons he gives which is unfortunate to me, I think it is a fact to be considered, he did not get any of this treatment while he was incarcerated. And [it was] one of the main reasons he walked off the work furlough program....

(RT 10/20/82 at 27-28.) In addition, Dr. Bindelglas's 1982 report noted that Petitioner sought but did not receive psychological treatment. (Dkt. 70, Ex. D at 2.) For these reasons, there is no merit to Petitioner's claim that counsel failed to urge Petitioner's need for psychological counseling as a mitigating circumstance.

To bolster this claim in his 1987 PCR petition, Petitioner included an affidavit from Dr. Francis Enos, a psychologist. Dr. Enos stated in his affidavit that Petitioner's long period of incarceration (by that time more than five years) had had a salutary effect on his mental and emotional problems; he concluded that Petitioner no longer has "any significant emotional

pathology" and opined that Petitioner "has come to grips with all the things that have bothered him in the past and is now doing what he can to make his life as productive as possible, considering the present circumstances." (Dkt.26, Attach., Ex. 13.)

The Court concludes that adding Dr. Enos's affidavit to the evidence heard by the sentencing court concerning Petitioner's psychological problems and his failure to get counseling while in jail, does not establish a reasonable probability of a different outcome, particularly when weighed against the evidence presented at trial of Petitioner's active participation in the brutalization and murder of Maya. First, Dr. Enos's conclusion that "thousands of hours of incarceration" have had a beneficial effect on Petitioner's mental health (*see* Dkt. 26, Attach., Ex. 13 at 1) is an assessment that could not have been made at the time of sentencing, and any testimony by him at that time would have been prospective and highly speculative. Moreover, as noted, at the mitigation hearing the sentencing court heard evidence and argument from counsel of Petitioner's need for psychological treatment and the jail system's failure to provide it. Nevertheless, the sentencing court did not consider this evidence sufficiently mitigating to warrant leniency. The Court does not believe there is a reasonable probability that testimony from Dr. Enos would have changed that calculation. Thus, even if counsel was deficient for not calling Dr. Enos to testify, Petitioner cannot establish prejudice. As a result, the PCR court's denial of relief was not objectively unreasonable under *Strickland*.

Cumulative Error

None of Petitioner's claims of IAC at sentencing warrant habeas relief. In each instance Petitioner has failed to demonstrate that counsel's performance was deficient and/or show that he was prejudiced by counsel's alleged shortcomings. Nor does the Court believe that these allegations, considered cumulatively, amount to deficient performance or establish prejudice. *See* Davis, 384 F.3d at 654.

Finally, the Court's conclusion that Petitioner has failed to demonstrate prejudice with respect to his claims of ineffective assistance at sentencing are reinforced by the fact that the same judge who presided at his trial and sentencing also presided at the 1987 PCR proceeding. That judge specifically stated that nothing presented in support of Petitioner's claims of IAC at sentencing would have caused him to reconsider the death sentence. (ROA-PCR, Vol. 1 of 1, ME 2/10/88 at 1.) This finding, based on the judge's familiarity with the trial record, the mitigating evidence presented prior to sentencing, and the additional documentary evidence provided in support of the claims in the 1987 PCR petition, provides the Court with additional reason to extend deference to the PCR court's denial of relief. *See* Smith v. Stewart, 140 F.3d 1263, 1271 (9th Cir.1998) (stating that when the judge who presided at the PCR proceeding was also the sentencing judge, the court "would be considerably less inclined to order relief" for that might approach "a looking-glass exercise in folly").

Evidentiary Hearing

As with his claims of IAC during the guilt phase, Petitioner has not established that the current record is insufficient to resolve these claims. Moreover, as noted in addressing the substance of his claims of IAC at sentencing, Petitioner has not demonstrated prejudice with regard to any of these claims. For this reason, the Court believes the facts alleged in support, even if proved, would not entitle him to relief. *See Townsend*, 372 U.S. at 312-13. Petitioner's request for an evidentiary hearing on these claims will be denied.

Claim 39-IAC on Appeal

Petitioner asserts that appellate counsel rendered ineffective assistance. (Dkt. 65 at 39-40.) Specifically, Petitioner alleges that appellate counsel never met with him "personally" and counsel alone decided what claims to raise. (*Id.* at 39.) In addition, Petitioner contends that appellate counsel raised only four claims on direct appeal and "did not raise trial counsel's ineffectiveness at either the guilt or sentencing phases of the trial." (*Id.*) Petitioner also asserts that all other claims presented in his amended federal habeas petition should have been raised by appellate counsel on direct appeal.

The Fourteenth Amendment guarantees a criminal defendant the right to effective assistance of counsel on his first appeal. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). A claim of ineffective assistance of appellate counsel is reviewed according to the standard in *Strickland*. *See Miller v. Keeney*, 882 F.2d 1428, 1433-34 (9th Cir.1989). Petitioner must show that counsel's

appellate advocacy fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's deficient performance, Petitioner would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *see also Miller*, 882 F.2d at 1434 n. 9 (citing *Strickland*, 466 U.S. at 688, 694).

Petitioner's unsupported assertions are simply too vague and conclusory to support habeas relief. *See Shah*, 878 F.2d at 1161. Moreover, appellate counsel's failure to present issues of ineffective assistance of counsel on direct appellate review is not deficient. In *State v. Spreitz*, 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002), the Arizona Supreme Court stated unequivocally that "ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal ... will not be addressed regardless of merit." Prior to *Spreitz*, it was common practice in Arizona to raise ineffective assistance of counsel claims on collateral review. *See State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) (citing Ariz. R.Crim. P. 31.4).

Further, Petitioner cannot show prejudice from counsel's failure to raise claims of ineffective assistance of counsel on direct appeal. Counsel presented these claims in his 1987 PCR petition and they were considered on the merits. In sum, Petitioner has not alleged a viable claim of ineffective assistance of appellate counsel. His only specific claim relates to a failure to raise IAC claims on direct appeal; however, Petitioner has failed to demonstrate he was prejudiced by this alleged failure. The PCR court's denial of relief

was not objectively unreasonable in light of the principles outlined in *Strickland* and *Robbins.*

Evidentiary Hearing

Petitioner makes no specific request for an evidentiary hearing on his claims of IAC on appeal. In any event, for the reasons stated, Petitioner has not asserted any example of prejudice flowing from counsel's failure to raise claims of ineffective assistance on direct appeal. Thus, to the extent Petitioner seeks an evidentiary hearing with respect to this claim, the request will be denied.

IV. Evidentiary Hearing

Petitioner made a blanket request for an evidentiary hearing for all his claims. (Dkt. 65 at 1.) However, he made a specific request only as to the IAC claims, which are addressed above, and Claim 17 (*see* Dkt. 83 at 71). As discussed in the Court's analysis of the merits of Claim 17, Petitioner has not, as a matter of law, established a constitutional violation based on the trial court's failure to *sua sponte* grant a new trial based on the reports of Drs. Dee and Bindelglas. The Court concludes that the facts alleged in support of this claim, even if established at a hearing, would not entitle Petitioner to relief; thus, his request for a hearing will be denied. *See Townsend*, 372 U.S. at 312-13. As to the remaining claims, the Court finds that an evidentiary hearing is neither warranted nor required.

Accordingly,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt.13) is denied. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the Clerk of Court send a courtesy copy of this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, Arizona 85007-3329.

D.Ariz.,2007.
Libberton v. Schriro
Not Reported in F.Supp.2d, 2007 WL 2746649 (D.Ariz.)

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APPENDIX C

United States District Court,
D. Arizona.
Laurence K. LIBBERTON, Petitioner,
v.
Dora B. SCHRIRO, et al., Respondents.
No. CIV 97-1881 PHX-EHC.

Oct. 22, 2007.

Robert John Gorman, Office of the Attorney General, Tucson, AZ, for Respondents.

Denise I. Young, Tucson, AZ, Jose A. Cardenas, Lewis & Roca LLP, Phoenix, AZ, Todd Edward Hale, Lewis & Roca LLP, Tucson, AZ, Julie Singleton Hall, Law Office of Julie Singleton Hall, Oracle, AZ, for Petitioner.

ORDER

EARL H. CARROLL, Judge.

Pending before the Court is Petitioner's Motion to Alter or Amend Judgment filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Dkt.98.) Previously, this Court denied Petitioner's amended petition requesting habeas relief. (Dkt.95.) Petitioner asks the Court to reconsider: (1) its determination to apply the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) to these proceedings; (2) its decision not to expand the record to include the 1992 deposition of Petitioner's trial counsel, George Lim; the 1993 affidavit of Daniel McIntosh; and the 1991

affidavit of Martin Norton as to any claims other than Claims 1, 2 and 3 of the Amended Petition; (3) its determination as to the merits of Claims 9 and 41; and (4) its determination as to the merits of Claim 20. (Dkt. 98 at 2.)

DISCUSSION

A motion to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure is in essence a motion for reconsideration. Rule 59(e) offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir.2000). The Ninth Circuit has consistently held that a motion brought pursuant to Rule 59(e) should only be granted in "highly unusual circumstances." *Id.*; *see 389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.1999). Reconsideration is appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.1999) (per curiam); *see School Dist. No. 1J. Multnomah County, Or. v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993). A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs. *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 925-26 (9th Cir.1988). Nor is it the time to ask the court to "rethink what it has already thought through." *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D.Ariz.1998).

I. Applicability of the AEDPA

Petitioner first asks that the Court reconsider its determination that the provisions of the AEDPA apply to this case. Alternatively, he requests the Court issue a Certificate of Appealability (COA) on this question. (Dkt. 98 at 2-6.) Upon review, the Court does not believe this issue warrants reconsideration. Petitioner merely re-argues what he previously argued and seeks to distinguish the cases relied upon by the Court in rendering its decision. For this reason, and because the Court believes it correctly determined this question, the Court declines to "rethink what it has already thought through." *Rezzonico*, 32 F.Supp.2d at 1116. Regarding Petitioner's request for a COA on this issue, the AEDPA applies to this proceeding and this request will also be denied. (*See* Dkt. 95 at 7-8.)

II. Expansion of the Record

Petitioner next challenges the Court's determination not to permit expansion of the record to consider the 1992 deposition of Petitioner's trial attorney, George Lim; the 1993 affidavit of Daniel McIntosh, or the use of Martin Norton's 1991 affidavit accept in addressing Claims 1, 2 and 3 of the Amended Petition. (*See* Dkt. 98 at 2, 6-9.) The Court denied the request to expand with respect to these documents because it concluded, in each instance, that Petitioner was not diligent in presenting them in state court. (*See* Dkt. 95 at 64, 65-67.)

Again, Petitioner's arguments in support of expanding the record merely evince disagreement with the Court's

conclusions concerning his diligence in obtaining this information in state court. Petitioner cites no newly discovered evidence or change in the law to bolster these claims, nor has he demonstrated the Court's conclusion was clear error. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.1999) (per curiam). Instead, he reiterates that the state courts denied him funds to obtain these documents. (Dkt. 98 at 8, n. 1.) In addition, for the first time, Petitioner contends he was hampered in obtaining any documentation from George Lim and the McIntosh and Norton affidavits before the 1991-93 time frame, because Lim refused to sign an affidavit prior to his 1992 deposition, and McIntosh and Norton "moved around a lot" and were not "the most willing or cooperative of witnesses." (*Id.*) These additional assertions were not raised previously. A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs. *See Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir.1988); *see also U.S. v. $32,000 in U.S. Currency*, No. CIV 06-1766-PHX-DGC, 2007 WL 1526764, at * 1 (D.Ariz., May 24, 2007) ("Motions under Rule 59(e) are not the place for parties to assert arguments that could have been made, but were not made, in their original briefs.") For all these reasons, the Court declines to "rethink what it has already thought through" and this claim will be denied.

III. Claims 9 and 41

Petitioner next requests reconsideration of the Court's determination to deny habeas relief with respect to Claims 9 and 41.[FN1] (Dkt. 98 at 2, 9-10.) Upon review,

it again appears Petitioner merely disagrees with the Court's evaluation of these claims and re-argues his position. (*See* Dkt. 98 at 9-10.) This is not a sufficient basis to support reconsideration. The Court declines to "rethink what it has already thought through" (*see* Dkt. 95 at 39-45), and the motion will be denied.

> FN1. In Claims 9 and 41, Petitioner contends that during voir dire via a jury questionnaire, and later at trial, the prosecution and the trial court effectively vouched for the credibility of the prosecution's main witness, Martin Norton. (*See* Dkt. 13 at 36, 46; Dkt. 65 at 31; *see also* Dkt. 95 at 38-39.)

IV. Claim 20

Last, Petitioner seeks reconsideration of the Court's determination to deny habeas relief with respect to Claim 20 of the Amended Petition. (Dkt. 98 at 2, 10-13.) In Claim 20, Petitioner contends the sentencing court failed to consider and give effect to all proffered mitigating evidence, including: (1) his youth; (2) his impulsive conduct, inability to premeditate, and abusive childhood; (3) the state's failure to provide him promised psychiatric treatment; (4) his lack of a previous record of violence; (5) the fact that his prior felony record stemmed from his abusive father filing charges against him; and (6) the fact that his conduct was that of a follower who did not initiate the crime. (*See* Dkt. 13 at 39; Dkt. 65 at 36-39.)

For the reasons stated in the Court's order denying habeas relief, Petitioner has not established that either

the sentencing court or the Arizona Supreme Court on review failed to consider all mitigation evidence presented by Petitioner.[FN2] Petitioner can point to nothing in the record to support his contention that the state courts refused to consider all proffered mitigation. Rather as stated by this Court in its order denying relief:

> FN2. Petitioner argues for the first time in the motion to reconsider that the state courts did not consider all relevant mitigation because Arizona case law at the time unconstitutionally required a showing of a nexus or causal connection between the proffered mitigation and a defendant's conduct, thus "preclud[ing] full and proper consideration of Petitioner's mitigation in the record." (*See* Dkt. 98 at 12.) The Court notes that nothing in the record indicates the state courts refused to consider mitigation proffered by Petitioner on that basis and his assertion is purely speculative. In addition, Petitioner did not raise this argument in either his Amended Petition or Merits Brief. As already noted, it is not proper to consider new claims or theories presented for the first time in a motion to reconsider. *See Northwest Acceptance Corp.*, 841 F.2d at 925-26; *see also $32,000 in U.S. Currency*, 2007 WL 1526764 at *1.

The heart of Petitioner's contention appears to be that the Arizona courts were obligated to find the evidence he presented to be mitigating. The Constitution does not require such a finding. There is

a distinction between "a failure to consider relevant evidence and a conclusion that such evidence was not mitigating"; the latter determination does not implicate the Constitution. *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir.2006).
(Dkt. 95 at 34.) As a result, Petitioner's arguments in support of reconsideration notwithstanding, the Court declines to "rethink what it has already thought through." *Rezzzonico*, 32 F.Supp.2d at 1116.

IT IS THEREFORE ORDERED that Petitioner's Motion to Alter or Amend Judgment (Dkt.98) is **DENIED.**

IT IS FURTHER ORDERED that the Clerk of the Court shall update the title of this case to reflect the substitution of Dora B. Schriro as the Director of the Department of Corrections.

D.Ariz.,2007.
Libberton v. Schriro
Not Reported in F.Supp.2d, 2007 WL 3101841 (D.Ariz.)

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APPENDIX D

Supreme Court of Arizona, In Banc.
STATE of Arizona, Appellee/Cross-Appellant,
v.
Lawrence K. LIBBERTON, Appellant/Cross-Appellee.
No. 5701.

April 23, 1984.

Defendant was convicted in the Superior Court, Maricopa County, Cause No. CR-123711, Rufus C. Coulter, Jr., J., of first-degree murder, aggravated robbery, kidnapping and theft, and was sentenced to death. On automatic appeal, the Supreme Court, Hays, J., held that: (1) for purpose of determining whether mitigating circumstances regarding extent of defendant's participation in offense were present, evidence established beyond reasonable doubt that defendant intended to kill victim; (2) testimony regarding defendant's escape from work furlough program, which alluded to prior felony convictions, was admissible to prove defendant's motive; (3) aggravating factor that offense was committed while defendant was in custody of Department of Corrections was not applicable to defendant, since he was not confined when he committed offense; (4) aggravating circumstance of offense being committed for pecuniary gain was applicable to defendant, who killed victim to hinder detection of his theft of victim's car and wallet; (5) aggravating circumstance of "heinous, cruel or depraved" was applicable; (6) mitigating circumstances asserted by defendant that he was following lead of

other assailant, that he was young at time of crime, and that he had no previous record of violence were not sufficiently substantial to call for leniency; and (7) death penalty was not disproportionate to penalty imposed in similar cases.

Affirmed.

(Formerly 203k357(11), 203k354)
Imposition of death penalty upon defendant who, along with another assailant, beat victim, held gun on victim while victim was driving to mine shaft, beat victim with rocks, a board, and then with more rocks, then threw victim's body down mine shaft, was not disproportionate to penalty imposed in similar cases.
Robert K. Corbin, Atty. Gen. by William J. Schafer III, Jack Roberts and David R. Cole, Asst. Attys. Gen., Phoenix, for appellee/cross-appellant.

James Hamilton Kemper, Phoenix, for appellant/cross-appellee.

HAYS, Justice.

Appellant, Lawrence Libberton, was convicted of first degree murder, A.R.S. § 13-1105, aggravated robbery, A.R.S. § 13-1903, kidnapping, A.R.S. § 13-1304, and theft, A.R.S. § 13-1802, all in connection with the same incident. Appellant was sentenced to death for the murder conviction. He was also sentenced to terms of imprisonment of 15 years for the aggravated robbery, 21 years for the kidnapping, to be served consecutively to the aggravated robbery sentence, and 5 years for the theft, to be served consecutively to the kidnapping

sentence. The case was automatically appealed to this court. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), A.R.S. § 13-4031, and A.R.S. § 13-4035. We affirm.

In addition to our independent review of the aggravating and mitigating circumstances found by the sentencing judge, our proportionality review, and our review of the record for fundamental error, six issues confront us:

1. whether appellant was denied his right to a unanimous jury verdict because the jury was given only guilty and not guilty verdict forms for the murder charge even though appellant was charged alternatively with premeditated murder and felony murder;

2. whether appellant's death sentence is invalid because the sentencing judge did not find beyond a reasonable doubt that appellant killed, intended to kill or attempted to kill;

3. whether appellant was denied his right to trial by jury because Arizona's death penalty statute empowers the trial judge to find aggravating and mitigating circumstances;

4. whether Arizona's death penalty statute is unconstitutional because it fails to provide sentencing judges with guidelines on how to balance aggravating and mitigating circumstances;

5. whether the trial court committed fundamental

error by admitting evidence of appellant's absence from a Department of Corrections work furlough program; and

6. whether the aggravating factor set forth in A.R.S. § 13-703(F)(7)-the defendant committed the offense while in the custody of the Department of Corrections-applies to appellant. (This issue was urged by the state on cross-appeal.)

In the early morning hours of November 17, 1981, the victim, Juan Maya, picked up a hitchhiker, Martin Norton. Norton, a 14-year-old, lived with a friend, Steven James, in a mobile home trailer located in Phoenix. Maya drove to the trailer and, according to Norton, made homosexual advances. Norton resisted and told Maya he should go in the trailer because there was a homosexual there who could satisfy Maya's desires. Maya entered the trailer, which was occupied at the time by James and the appellant, Libberton. Norton told James that Maya was gay and to get rid of him. James then kicked Maya in the crotch, and Maya left the trailer and ran. James and appellant pursued Maya and brought him back to the trailer. Norton testified that Maya's nose and mouth were bleeding when he was brought back to the trailer.

Once again in the trailer, Norton, James, and appellant took turns hitting Maya in the face. Maya pleaded with them to take his car and credit cards and quit hitting him. James had a gun in his hand and took Maya's wallet. From the wallet, appellant obtained the title to Maya's car, and forced Maya to sign the title over to appellant. James took Maya's bracelet and ring.

Appellant put on Maya's belt, which had Maya's name engraved on the back, and said, "[n]ow that I own Juan Maya's car I might as well be Juan Maya."

The three assailants then discussed, in Maya's presence, what to do with Maya. James said "[t]he only thing we can do is kill him." Appellant agreed. Next, James suggested the three could hide the body in a mine shaft on his parents' property in Salome. Appellant agreed, and at gunpoint forced Maya into Maya's car. Appellant kept the gun pointed at Maya all the way to Salome, approximately a two-hour drive from the trailer. On the way, James bought gas and cigarettes with one of Maya's credit cards. Later, along the highway to Salome, a police officer stopped the car for speeding. James, the driver, got out of the car and talked with the officer. Appellant threatened to shoot Maya if he said anything. James got back in the car and the group proceeded to Salome.

The group arrived at James' parents' property shortly before daybreak. Appellant handed the gun to James who ordered Maya to walk up the side of a small mountain to the mine shaft. Maya requested and was allowed to smoke a cigarette. The assailants stood by Maya, allowing him to finish his cigarette, before beginning the final assault. When Maya finished his cigarette, James ordered Maya to step to the shaft, a hole about five feet in diameter with a beam across the top. Maya screamed "[d]on't kill me." James fired at Maya twice from less than five feet. (Only sparks and no bullets came out of the gun because, as established at trial, the gun was filled with debris.) Maya ran at James, grabbed the gun, struggled with James, and fell

to the ground. Appellant grabbed a five-pound rock and began beating Maya on the back of the head and shoulders with it. Maya was still struggling with James for the gun. Norton handed appellant a board, with which appellant struck Maya on the back, forcing Maya to let go of the gun. James then shot in the direction of Maya's head. As before, only sparks came out of the gun. Maya was still conscious, making "gurgling sounds," and moaning. Appellant grabbed the gun from James and fired it at Maya's head. Again, the gun malfunctioned. Maya was still not dead, so all three assailants picked up large rocks and slammed them on the back of Maya's head as Maya lay face down. After about five blows Maya lay unconscious. Appellant and James dragged Maya to the mine shaft and threw him in.

Back in the car appellant and James told Norton that if he told anyone they would kill him. The three then returned to Phoenix. James told Norton to clean the trailer and remove Maya's blood from the couch. That morning appellant and James picked up a David McIntosh in Maya's car. The three assailants and McIntosh drove around. Appellant bought some shoes with one of Maya's credit cards. At noon the three assailants were captured when appellant attempted to get a cash advance of $20 on Maya's MasterCard.

I. FORM OF VERDICT

[1] Appellant argues that he was denied his right to a unanimous jury verdict as guaranteed by Ariz. Const. art. 2, § 23 because he was charged alternatively with premeditated murder and felony murder but the jury

was given verdict forms only of "guilty of first degree murder" and "not guilty of first degree murder." In *State v. Encinas*, 132 Ariz. 493, 496-97, 647 P.2d 624, 627-28 (1982), we decided this issue contrary to appellant's position. We have affirmed our position since then, *see State v. Berndt*, 138 Ariz. 41, ---, 672 P.2d 1311, 1315 (1983); *State v. Smith*, 136 Ariz. 273, 277, 665 P.2d 995, 999 (1983), and continue to do so today.

II. *ENMUND* FACTORS

[2] Appellant claims that his death sentence is invalid because the sentencing judge did not, in compliance with *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and as adopted by this court in *State v. McDaniel*, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983), determine beyond a reasonable doubt that appellant killed, attempted to kill, or intended to kill. Because appellant was sentenced before we decided *McDaniel*, the trial court did not have the benefit of that case when pronouncing sentence. Similarly, the trial court in *McDaniel* sentenced the defendant before we adopted *Enmund*. Nevertheless, in *McDaniel* we reviewed the record and independently concluded that the defendant had in fact killed the victim. As in *McDaniel*, in the present case the record establishes beyond a reasonable doubt that *Enmund* is satisfied.

In finding that the mitigating circumstance listed in A.R.S. § 13-703(G)(3) [FN1] did not exist, the sentencing judge stated that "[t]he defendant was one of the individuals who actually committed the offense and was not found guilty by reason of being legally

accountable for the conduct of another person ...." Appellant correctly points out that this finding was not made beyond a reasonable doubt.

> FN1. This mitigating circumstance provides: "The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

After reviewing the record we agree with the trial court that appellant's participation in the murder was not minor. Rather, appellant actively participated in the murder. At the trailer appellant agreed with James that the only thing to do was to kill Maya. Appellant also agreed to hide Maya's body in the mine shaft. Appellant pointed a gun at Maya during the trip to Salome, and when the police officer stopped the car, appellant threatened to shoot Maya if he said anything. At the mine shaft, while Maya was struggling with James, appellant struck Maya first with a rock and then with a board. As Maya lay still on the ground, appellant pointed and fired a gun at Maya's head from close range. Appellant then slammed ***137**1289** large rocks onto Maya's head. Finally, appellant helped throw Maya into the mine shaft. These facts establish beyond a reasonable doubt that appellant intended to kill Juan Maya.

III. RIGHT TO JURY

[3] Appellant urges that he was denied his right to trial by jury because Arizona's death penalty statute

unconstitutionally empowers the trial judge to find aggravating and mitigating factors. *See* A.R.S. § 13-703. We have rejected this contention and continue to do so. *See, e.g., State v. Jordan*, 137 Ariz. 504, 506, 672 P.2d 169, 171 (1983).

IV. SENTENCING GUIDANCE

[4] Appellant asserts that Arizona's death penalty statute is unconstitutional because it fails to provide trial judges with guidance on how to balance aggravating and mitigating factors. We rejected this contention in *State v. Gretzler*, 135 Ariz. 42, 53-56, 659 P.2d 1, 12-15, *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983).

V. EVIDENCE OF PRIOR CONVICTIONS

At the time of the incident at issue the appellant was an escapee from a Department of Corrections work furlough program. Appellant points to four references made at trial about his escape from the work furlough program. Appellant argues that an accused's prior felony convictions cannot be used as evidence against him except to impeach his testimony if he testifies, and that although it was not explicitly stated at trial that appellant had prior felony convictions, the references to the escape from the work furlough program essentially informed the jury of those prior felonies.

[5] We agree with appellant that the references to his escape from the work furlough program informed the jury that appellant had prior felony convictions. We note, however, that prior felony convictions can be used

against a defendant in more ways than that suggested by appellant. We agree with the state that evidence of prior felony convictions can also be used to prove motive. *See, e.g.,* State v. Mincey, 130 Ariz. 389, 404, 636 P.2d 637, 652 (1981), *cert. denied,* 455 U.S. 1003, 102 S.Ct. 1638, 71 L.Ed.2d 871 (1982); *State v. Ferguson,* 120 Ariz. 345, 347, 586 P.2d 190, 192 (1978); Rules of Evidence, rule 404(b).

[6] In *Ferguson* we found that the defendant had committed the robberies in question to obtain money and a vehicle to complete his escape from custody. We concluded that the exigencies of escape constituted the motive for the robberies. A similar situation exists in the present case. The first reference to the work furlough program was made when the arresting officer, a Detective Neuss, testified. Neuss testified that appellant said he obtained the victim's car from friends he did not want to name. The following colloquy between the state's counsel and Neuss then took place.

Q Did he tell you why he wanted that car?

A Yes.

Q What did he tell you?

A He told us that he wanted the car so that he could get out of the state.

Q Why?

A Because he was a walk-away from the work furlough program with the Department of

Corrections.

The second reference was made during the state's direct examination of Daniel McIntosh, the appellant's friend who the assailants picked up in Maya's car a few hours after the crime.

Q Had you made plans with Larry Libberton?

A Yeah, we were going to leave town that night.

Q Where were you going?

A I don't know exactly.

Q Why were you leaving town?

A Just to get away from Arizona.

Q Did Mr. Libberton tell you why he was leaving town?

A Because he had escaped from the Durango facility.

Q What were you going to take, what type of transportation?

A The car.

Q Which car?

A The Thunderbird. [The victim's car.]

Both of these discussions demonstrate a motive for the crimes charged: the appellant wanted the car so he

could leave Arizona to evade capture from his escape from a work furlough program; he wanted money to facilitate his flight from Arizona authorities; and he then killed the victim to hinder detection of the theft of Maya's car and wallet. Both of these allusions to appellant's prior convictions were admissible to show motive.

[7][8] The third reference to prior felonies was brought out by defense counsel on cross-examination of McIntosh:

> Q You also indicated that you decided to leave town with Larry; is that right?
>
> A Yes.
>
> Q He really didn't escape, he walked off a work furlough program?
>
> A He just didn't return.
>
> Q He had been housed over at Durango; isn't that right?
>
> A Yes, sir.

Because defense counsel elicited this testimony, the admission of it must be fundamental error before we will grant relief to appellant. *Cf.* *State v. Smith*, 136 Ariz. 273, 277, 665 P.2d 995, 999 (1983) (failure to object to prosecutor's remarks waived issue on appeal absent fundamental error). We have described fundamental error as error going to the foundation of

the case or that which takes from the defendant a right essential to his defense, *State v. Gamble*, 111 Ariz. 25, 26, 523 P.2d 53, 54 (1974), and as error of such magnitude that the defendant could not possibly have had a fair trial, *State v. Smith*, 114 Ariz. 415, 420, 561 P.2d 739, 744 (1977). Because evidence of appellant's escape from the work furlough was already properly in evidence, we fail to comprehend how admission of the same evidence in the present context was error going to the foundation of the case, or error taking from the defendant a right essential to his defense, or error of such magnitude that appellant did not have a fair trial.

[9][10] The final reference to prior convictions occurred during the state's closing argument:

> He [McIntosh] told you that [during the morning after the murder] he went back over to the trailer and Lawrence Libberton had changed his clothes and he thought those were awfully nice clothes, and he knew that he hadn't gone home, because he knew that he was AWOL from the work furlough program, and he knew that they would be looking for him at his house....

Because the statement was not objected to, the admission of it must be fundamental error before we will grant relief to appellant. *State v. Smith, supra*, 136 Ariz. at 277, 665 P.2d at 999. For the same reason we did not grant relief for the third allusion to prior felonies-there was no fundamental error-we will not grant relief because of this allusion to appellant's absence from the work furlough program.

VI. CUSTODY AS AN AGGRAVATING FACTOR

[11] The state urges by cross-appeal that the aggravating factor set forth in A.R.S. § 13-703(F)(7)-that the defendant committed the offense while in the custody of the Department of Corrections-applies to appellant. The state recognizes that this court in *State v. Gillies*, 135 Ariz. 500, 512, 662 P.2d 1007, 1019 (1983), held that this aggravating circumstance does not apply to persons on unsecured work furlough. The state distinguishes *Gillies* by saying that in this case appellant was on secured work furlough (he was required to return to the Durango facility each day at 6:00 p.m.) whereas the defendant in *Gillies* was on unsecured work furlough.

In *Gillies* we stated that the legislature's purpose for enacting A.R.S. § 13-703(F)(7) is "to protect the guards and other inmates at such institutions where a defendant is confined and to discourage violence by incarcerated persons." 135 Ariz. at 512, 662 P.2d at 1019. Appellant was not confined when he committed the offense, nor was he incarcerated. Section 13-703(F)(7) does not apply to him.

VII. INDEPENDENT REVIEW OF AGGRAVATING AND MITIGATING FACTORS

[12] At sentencing, the court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency, and then sentenced appellant to death. Pursuant to *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41, *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1976), we

independently review the record to determine the existence or absence of aggravating and mitigating circumstances, and determine whether the death penalty should be imposed.

[13][14] The first aggravating circumstance found by the sentencing court was that the offense was committed in the expectation of the receipt of something of pecuniary value. A.R.S. § 13-703(F)(5). Pecuniary consideration must be a cause of the murder, not merely a result. *E.g., State v. Gillies,* 135 Ariz. 500, 512, 662 P.2d 1007, 1019 (1983). In the instant case, we have already concluded that the appellant wanted Maya's car so he (appellant) could leave Arizona to evade capture from his escape from the work furlough program, that appellant wanted money to facilitate his flight from Arizona authorities, and that appellant then killed Maya to hinder detection of the theft of Maya's car and wallet. We agree with the sentencing court that a cause for the murder was pecuniary gain. *See State v. Gretzler,* 135 Ariz. 42, 50, 659 P.2d 1, 9, *cert. denied,* 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983) (defendants committed the murders "to obtain a substitute car in which they could continue their flight"); *State v. Tison,* 129 Ariz. 546, 555, 633 P.2d 355, 364 (1981), *cert. denied,* 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147, (1982) (homicides were committed to secure a vehicle in which assailants could continue their flight); *State v. Clark,* 126 Ariz. 428, 436, 616 P.2d 888, 96, *cert. denied,* 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980) (defendant killed and then took victims' credit cards, money, rings, and car; court concluded that "[t]he circumstances surrounding the total episode

reflect that the expectation of financial gain was a cause of the murders.").

[15][16] The second aggravating circumstance found by the sentencing court was that the murder was committed in an especially heinous, cruel or depraved manner. A.R.S. § 13-703(F)(6). Because the statutory expression is in the disjunctive, a finding of only one of these factors is necessary to constitute this aggravating circumstance. *E.g. Clark, supra,* 126 Ariz. at 436, 616 P.2d at 96. Heinous and depraved refer to the perpetrator's mental state whereas cruelty involves mental and physical pain suffered by the victim. *Id.*

[17] It is clear that the murder in the instant case was committed in a cruel manner. The victim suffered great mental anguish. "Evidence of the mental anguish of a victim, resulting from such factors as being held captive for an extended period, uncertain as to his ultimate fate, is relevant to establish cruelty." *State v. Gillies, supra,* 135 Ariz. at 513, 662 P.2d at 1020. The victim in the present case heard the assailants discuss killing him, and even where to hide the body. Maya was forced into his own car and held at gunpoint during the two-hour drive to Salome, a place he knew the assailants had chosen to commit the murder. The assaults on Maya began within a couple of hours after midnight, and Maya was not killed until almost daybreak. Thus, Maya was held captive, uncertain as to his ultimate fate, for several hours before the killing. At the mine shaft, Maya requested and was allowed to smoke one last cigarette before his execution. Therefore, even after arriving at the place chosen for the murder, Maya was subjected to the additional

torment of being allowed to delay the inevitable by smoking his final cigarette while his assailants stood by, delaying their final assault until he finished. Finally, Maya pleaded for his life. We find that these facts beyond any reasonable doubt establish mental cruelty.

[18] In addition to mental cruelty, Maya was physically abused. He was beaten in the trailer, outside the trailer after he attempted to flee the assailants, and in the trailer again after his assailants pursued and caught him. In Salome, Maya, while conscious, was beaten with rocks, a board, and then with more rocks. The appellant inflicted physical pain upon Maya. We agree with the sentencing court that the aggravating circumstance "heinous, cruel or depraved" exists in this case.

[19] The appellant urged several non-statutory mitigating circumstances: that he is a follower and merely followed the lead of James in committing the murder, that he had been promised but was never given psychological care while in custody previously, that he was young (20 years) at the time of the crime, that he has no previous record of violence, and that he would not have had a juvenile record were it not for his own father filing charges against him.

In response, we first note that from the beginning the appellant actively participated in the crime, and even pointed the gun at Maya on the way to Salome. Second, there is no evidence that appellant's ability to appreciate the wrongfulness of his acts was substantially impaired. Third, the sentencing court

specifically found that appellant's age was not a mitigating factor. Considering the deliberation involved in the crime, and the duration of the crime, we agree that the appellant's age is not a sufficient factor to call for leniency. *See Gillies, supra*, 135 Ariz. at 513, 662 P.2d at 1020. Finally, we agree with the trial court that all of appellant's claimed mitigating circumstances, considered as a whole, are not sufficiently substantial to call for leniency.

VIII. PROPORTIONALITY REVIEW

[20] Finally, this court conducts a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Richmond, supra*, 114 Ariz. at 196, 560 P.2d at 51. We consider not only cases where the death penalty was affirmed but also cases where the death penalty was reduced to a sentence of life imprisonment. *State v. McCall*, 677 P.2d 920 at 935-936.

[21] In *State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983), the defendant and accomplices beat the victim, tied him up, poured liquor down his throat, gagged him, wrapped him in a blanket, and then locked him in the trunk of his own car. The victim was found two days later, dead from suffocation or heat exhaustion. We reduced the death sentence to life imprisonment because we found as a sufficiently substantial mitigating circumstance significant evidence that defendant and his accomplices did not intend to kill the victim.

We find the instant case is more analogous to cases such as *State v. Gillies, supra.* In *Gillies* the defendant and his accomplice robbed and raped the victim, then drove her to the Superstition Mountains where they threw her off a forty-foot cliff. When the assailants found her still alive, they beat her with rocks and then buried her with more rocks; she died 10-15 minutes after being buried. We upheld the death sentence, despite the defendant's young age, upon finding that the killing was committed in a cruel manner. We have reviewed other cases, such as *State v. Adamson,* 136 Ariz. 250, 665 P.2d 972, *cert. denied,* 464 U.S. 865, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983) (despite existence of mitigating factors, death penalty affirmed upon finding that the killing was done for pecuniary gain and in a cruel manner), and *State v. Bishop,* 127 Ariz. 531, 622 P.2d 478 (1980) (despite below average intelligence and lack of prior criminal record of defendant, death penalty affirmed upon finding that the killing was committed in heinous and depraved manner). We find that the imposition of the death penalty in this case is not disproportionate to the penalty imposed in similar cases. We conclude that the imposition of the death penalty in this case is justified.

As required by A.R.S. § 13-4035, we have reviewed the record for fundamental error. Having found none, the judgments of conviction and sentences are affirmed.

HOLOHAN, C.J., and GORDON, V.C.J., and CAMERON and FELDMAN, JJ., concur.
Ariz.,1984.
State v. Libberton

141 Ariz. 132, 685 P.2d 1284

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Supreme Court, U.S.
FILED

No. 091208 APR 5 - 2010

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs

LAURENCE K. LIBBERTON,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

APPENDICES E-H TO PETITION FOR WRIT OF CERTIORARI

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Attorney General

MARY R. O'GRADY
Solicitor General

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APPENDIX E

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Ctr.

CLERK OF THE COURT

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

DC03-17640 2-10-88 HON. RUFUS C. COULTER, JR.K. NISSEN
Code Date
Judge/Commissioner/Pro Tem Deputy

NO. CR-123711

STATE OF ARIZONA Attorney General
By: Jack Roberts

v.

LAURENCE K. LIBBERTON James R. Matthews

Defendant having filed a Petition for Post-Conviction Relief and the court having read and considered said petition, the State's response and defendant's reply, the court finds and concludes as follows:

1. Having presided at the trial of this case, this court is of the opinion that

nothing defendant has raised in his current petition for post-conviction relief would have affected the outcome of the trial or the sentencing;

2. This court is further of the opinion that the defendant received nothing but

effective assistance of three very experienced and qualified criminal attorneys;

3. The court finds that the defendant has failed to raise any colorable claim

whatsoever;

4. The court determines that no material issue of fact or law exists which

would entitle the defendant to relief under Rule 32 and that no purpose would be served by any further proceedings.

(CONTINUED)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

RECEIVED PROCESSED
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CLERK OF THE COURT

DC03-17640 2-10-88 HON. RUFUS C. COULTER, JR

K. NISSEN

Code Date Judge/Commissioner/Pro Tem
Deputy

NO. CR-123711

STATE OF ARIZONA v. LAURENCE LIBBERTON
(CONTINUED)

IT IS THEREFORE ORDERED dismissing the Petition for Post-Conviction Relief.

APPENDIX F

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

November 21, 1996 HON. BRIAN R. HAUSWER
(CVJ-12) P. Thompson
Deputy

No. CR123711

FILED: NOV 22, 1996

STATE OF ARIZONA Attorney General
By: Jack Roberts

v.

LAURENCE K. LIBBERTON Jose Cardenas

Criminal Court Administration

The Court has considered Defendant's Fourth Petition for Post-Conviction Relief, the State's response, and the reply.

The petition, which challenges the validity of a 1982 Judgment of sentence for first degree murder, aggravated robbery, kidnapping and theft, identifies two bases for relief. First, that the only eyewitness to the killing who testified at trial (Martin Norton), did so pursuant to a plea agreement which is

constitutionally defective under State v. Fisher, 176 Ariz. 69, 859 P.2d 179 (1983). Second, that the State failed to disclose that this same witness had been promised a benefit to induce his plea agreement which the jury should have been exposed to in judging his credibility. The second issue is promoted by Defendant on the appointed attorney. The claims will be referred to as the Fisher and Wertsching claims.

PRECLUSION

Pursuant to Rule 32.6(c), Arizona Rules of Criminal Procedure, the Court must identify whether the Defendant's claims are procedurally precluded.

FISHER

Defendant argues that Norton's plea agreement which contained a consistency clause has been found violative of due process of law in State v. Fisher, 176Ariz. 69, 859 P.2d 179 (1993), decided September 2, 1993. Defendant's Third Petition for

Continued

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

November 21, 1996HON. BRIAN R. HAUSWER
(CVJ-12) P. Thompson
Deputy

No. CR123711

Post- Conviction Relief was filed September 14, 1987 and was denied on June 3, 1988.

The State argues that this claim is precluded because it was adjudicated in the third petition. There are two reasons the State's preclusion argument should fail. First, when Defendant brought the due process claim regarding plea agreements with consistency clauses in 1987, the claim was brought in the context of the law that then existed. The Court finds that the Fisher claim filed in 1987 had a different force than does the Fisher claim in the Fourth petition. Second, preclusion is inappropriate if the Court finds a significant change in the law under Rule 32.1(g).

SIGNIFICANT CHANGE IN THE LAW

The Court finds that in 1993, Fisher announced a new rule that invalidated consistency provisions in plea agreements. The parties agree that the Court must determine whether to apply the new rule retroactively by applying the guidelines expressed in State v. Slemmer, 170 Ariz. 174, 823 P.2d 41 (1992).

First, the Court must determine if Fisher represents a clean break with past law. If it is a clean break, then Fisher does not automatically apply to cases on collateral review, such as the one sub judice. The previous Fisher decision, 141 Ariz. 227, 686 P.2d 750 (1984), did not decide whether a consistency clause in a plea agreement violated Fisher's constitutional

right to due process. At most, the Court "question[ned] its propriety" in a footnote. A footnote reference is a far cry from a unanimous panel decision of the Supreme Court which finds a due process violation expressly. The Court must presume, in the absence of evidence or even argument to the contrary, that law enforcement relied on its ability to impose consistency clauses in plea agreements until the new rule was announced in Fisher in 1993.

Having found that a clean break from the past was created by Fisher, the Court must analyze the three factors in Slemmer to determine whether Fisher should be applied retroactively to Defendant under Rule 32.1(g). In the determination, the Court is mindful that nonretroactivity is the presumptive result. Slemmer,.

Continued Page 6

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

November 21, 1996 HON. BRIAN R. HAUSWER
(CVJ-12) P. Thompson
Deputy

No. CR123711

at 180

In Fisher, the Court stated that consistency provisions in plea agreements "undermine the

reliability and fairness of the trial and plea bargaining processes and taint the truth-seeking function of the Court. . ." Fisher, 176 Ariz. at 74. The same could be said with equal force, however, of the rule not applied retroactively in Slemmer. See, State v. Hunter, 142 Ariz. 898, 688 P.2d 980 (1984). The purpose of the new rule does not militate in favor of retroactive application to cases on collateral review, as opposed to those cases which are not yet final.

The extend of reliance by law enforcement officials on the old rule

The State argues that common sense dictates that numerous plea agreements must have been executed with consistency provisions included. The Court finds that the use of such consistency provisions may or may not be a widespread as the use of the burden of proof instruction under discussion in Slemmer. That self-defense jury instruction had been published statewide and was conditionally approved by the Supreme Court. The Court is Slemmer found compelling reliance by law enforcement on the discarded jury instructions. Common sense does support compelling reliance by law enforcement on their ability to impose consistency provisions in plea agreements through September 2, 1993, when Fisher was decided. As noted by the State, for nine years after the issue was raised in Fisher in 1984, no rule was announced condemning the practice in this state and, to this date, the United States Supreme Court has not struck down consistency provisions in plea agreements.

The effect of retroactivity on the administration of justice

If the Court were to apply the Fisher rule to cases on collateral review, the undermining of final convictions "long since entered" would occur along with the resultant need to conduct retrials greatly hampered by the passage of time. This factor weighs heavily in favor of prospective application of Fisher.

The Court in this case follows the lead of the Supreme

Continued Page 7

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

November 21, 1996 HON. BRIAN R. HAUSWER
(CVJ-12) P. Thompson
Deputy

No. CR123711

Court in Slemmer in denying retroactive effect to the rule announced in Fisher.

NORTON'S AFFIDAVIT

Defendant also argues that Norton's affidavit dated October 18, 1991, constitutes newly discovered material facts justifying relief under Rule 32.1(e). The

affidavit was executed approximately ten years after the murder. The State argues a lack of due diligence and an improbability that this evidence would have changed the verdict. Defendant argues that the State's conduct, along with his trial counsel's ineffectiveness, prevented him from uncovering this evidence until the present petition was filed.

Obviously, the consistency provision, to which the Norton affidavit does not refer, was known to Defendant since trial as the plea agreement was admitted in evidence. The ostensible new information expressed in the affidavit is that Defendant acted out of fear of co-defendant James. This evidence, if believed, might tend to negate guilt or mitigate punishment. However, the Court has great difficulty finding that this evidence would not have been discovered through the exercise of due diligence before the prior three petitions for Post-Conviction Relief was filed. Norton's plea agreement required him to testify at trial in accordance with the December 29, 1981, interview with police. Nothing in the plea agreement prevented Norton from providing information about Defendant or any aspect of the case in any other forum or in any other form. The affidavit now presented could have been prepared in 1982, or at any time thereafter. Moreover, it is disingenuous for Defendant to argue that this evidence is new. The gravamen of the "new" evidence is that Defendant's will was subjugated to James's orders. Defendant made this argument on direct appeal. See, State v. Libberton, 141 Ariz. 132, 140, 685 P.2d 1284 (1984). Four petitions for Post-Conviction Relief later, Defendant claims Norton's affidavit on the point is newly

discovered evidence that was concealed from him. The Court finds otherwise. The Court expressly finds that the substance of the Norton affidavit raises grounds that have been precluded under Rule 32.2(a).

Continued Page 8

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

November 21, 1996 HON. BRIAN R. HAUSWER
(CVJ-12) P. Thompson
Deputy

No. CR123711

WERTSCHING

Wertsching's affidavit dated August 27, 1993, states that shortly after he was appointed to represent Norton, an attorney in the prosecutor's juvenile division promised that no transfer of his client to adult count would be sought if Norton would provide a full and accurate statement to the County Attorney and testify at trial consistently with the statement. The parties have stipulated that this evidence is newly discovered and Defendant has exercised due diligence in raising the issue.

Defendant argues that the jury should have been told about this promise because it was offered in

exchange for the December 29, 1981, statement. That statement is the one tied to Norton's trial testimony through the consistency provision in the plea agreement. The State argues that the affidavit lacks credibility when compared to affidavits of the Defendant's prosecutor and the juvenile division prosecutors, all of whom deny the existence of the promise.

The Court finds it unnecessary to weigh the credibility of these competing affidavits because in two other respects, the State should prevail. First, the Court finds that the disclosure of the alleged promise probably would not have changed the jury's verdict. As the State's response recites, the jury heard other evidence strongly circumstantial of Defendant's guilt. Second, Norton gave a consensual statement to the police on November 16, 1981, which fully incriminated Defendant before Wertsching was appointed to represent Norton and before Wertsching could have been promised anything by a member of the prosecutor's office. Also, because the November 16, 1981, statement would have been admissible to counteract the effect of a claim by Defendant that the December 19, 1981, statement was incredible because of the promise to Wertsching, it is impossible the verdict would have been changed.

IT IS ORDERED denying Defendant's Fourth Petition for Post-Conviction Relief.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAURENCE K. LIBBERTON,	)	NO. 07-99024
	)	
Petitioner-Appellant,	)	D.C. No. CV97-01881-EHC
	)	District of Arizona,
v.	)	Phoenix
	)	
CHARLES L. RYAN, Interim Director of the Arizona Department of Corrections,	)	ORDER
	)	
Respondent-Appellee.	)	

Before: W. FLETCHER, CLIFTON and M. SMITH, Circuit Judges.

The panel had voted to deny the petition for rehearing and to deny the petition for rehearing en banc, filed October 16, 2009.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has

requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX H

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN A FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. LAWRENCE KEITH LIBBERTON, Defendant.	NO. CR123711 SPECIAL VERDICT FILED 9 A.M. 10-25-82 VIVIAN KRINGLE, Clerk By_____ Deputy

As to aggravating circumstances, the Court finds the following:

1. The defendant has not been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant has not been previously convicted of a felony in the United

States involving the use or threat of violence on another person.

3. In the commission of the offense, the defendant did not create a grave risk of death to another person in addition to the victim of the offense.

4. The defendant did not procure the commission of the offense by the payment or promise of payment of anything of pecuniary value.

5. The defendant did commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value in that "the hope of financial gain was a cause of the murder." State v. Rumsey, (1981) 130 Ariz. 427; 636 P.2d 1209.

6. The Court finds that the defendant committed the offense in an especially heinous, cruel and depraved manner.

7. The defendant did not commit the offense while in the custody of the Department of Corrections, law enforcement agency or a county or city jail.

As to mitigating circumstances, the Court finds the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired and certainly not so impaired as to constitute a defense to the prosecution.

2. The defendant was not under unusual or substantial duress.

3. The defendant was one of the individuals who actually committed the offense and was not found guilty by reason of being legally accountable for the conduct of another under the provisions of A.R.S. 13-303. Therefore, this mitigating circumstances does not exist.

4. The defendant could have foreseen that this conduct in the course of the commission of the offense for which the defendant was convicted would cause or would create a grave risk of causing, death to another person. Therefore, this mitigating circumstances does not exist.

5. The Cuort does not find the defendant's age, to-wit: 20 years of age at the time of the offense and 21 years of age at the time of sentencing to be a mitigating circumstance.

6. The Court does not find any other mitigating circumstances.

The court having taken into account the aggravating and mitigating circumstances, the Court finds that two aggravating circumstances exist, to-wit: the offense was committed in expectation of the receipt of something of pecuniary value and defendant did commit the offense in an especially heinous, cruel and depraved manner; and the Court further finds that there are no mitigating circumstances significantly substantial to call for leniency.

DONE IN OPEN COURT this 25 day of October, 1982.

Judge RUFUS C. COULTER, JR.